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No. 85-2093

Supreme Court, U.S.
FILED
JUN 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE REVEREND JAMES O. MOTE, *et al.*,
Petitioners,

v.

THE BISHOP AND DIOCESE OF COLORADO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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June 24, 1986

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QUESTION PRESENTED

This case involves a church property dispute arising from the majority decision of a local church to disaffiliate and withdraw from the national denomination because of doctrinal controversies. The court below held that there was an "express trust created by implication in fact," which entitled the denomination and its faithful minority faction of the local church to possession and control of real and personal property that was titled to, and had continuously been in the possession of, the withdrawing local church corporation. The question presented is as follows:

In applying the "neutral principles analysis" of *Jones v. Wolf,* 443 U.S. 595 (1979), does a state court violate the First Amendment when it considers, and implies the existence of a trust from, evidence of a nonsecular and ecclesiastical nature, such as a parish's vows of accession and its participation in diocesan affairs, where such evidence is not couched in the traditional forms and language of trust law, is intertwined with religious concepts and does not expressly, directly or clearly reflect how the parties intended to deal with local church property in the event of the local church's withdrawal from the denomination?

LIST OF PARTIES

The Petitioners herein were respondents before the Supreme Court of Colorado, and defendants in the trial court, and are as follows: The Reverend James O. Mote; John Archibold; Marvin Olsen; John Brainerd; Wayne Gill; Chris Woodbury; Richard Atchison; Charles Buell; Rick Hill; Walter Kulp; James Lucero; Lorne Scofield; and St. Mary's Church, a Colorado

nonprofit corporation. St. Mary's Church has no parent, subsidiary or affiliated corporations.

The Respondents herein were petitioners before the Supreme Court of Colorado, and plaintiffs in the trial court, and are as follows: The Bishop and Diocese of Colorado, a Colorado nonprofit corporation; The Reverend Charles Larry Day, Allen Uyeda, Robert Douglass, H. David Huskin, Harry Thom, John Brown, Joseph Esch, Carla Parnell, Mildred Mullenax, John Helmore, Otis Drury, Marian Lattimore, as members of the Vestry of the Episcopal Parish of St. Mary's; the Episcopal Parish of St. Mary's; and Episcopal Church of St. Mary, a Colorado nonprofit corporation.

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THE BISHOP AND DIOCESE OF COLORADO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

The Reverend James O. Mote, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Colorado in the captioned case.

OPINIONS BELOW

The opinion of the trial court (App. A) is not reported. The opinion of the Colorado Court of Appeals (App. B) is reported at 668 P.2d 948. The opinion of the Supreme Court of Colorado (App. C) is reported at 716 P.2d 85. The Order of the Supreme Court of Colorado denying rehearing (App. D) is not reported.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on January 13, 1986. The order of the Supreme Court of Colorado denying timely petitions for rehearing was entered on February 24, 1986. This Court entered an order on May 13, 1986, extending the time to petition for a writ of certiorari to and including June 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. Const., Amend. XIV, Sec.1:

> . . .nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

The issue before the lower courts in this case concerned a property dispute between the majority and a minority faction within St. Mary's Church, an Episcopal church that was established in Denver, Colorado in the early 1930's. App. 37a. Each of the disputing factions contended that its respective governing board, or "vestry," was entitled in that capacity to possession and control of all real and personal property held by St. Mary's Church on November 28, 1976, when a majority of its then members voted to withdraw from the Episcopal Church. App. 39a-40a.

The facts, as found by the trial court (*see* App. 3a-13a), were based in part on a stipulation and were generally not in dispute. App. 37a. However, there was sharp disagreement regarding the proper legal standards by which the civil courts constitutionally may review church property disputes. The controversy concerned which of several alternative approaches was more consistent with constitutional limitations on judicial involvement and the limits of authorized judicial inquiry in church property cases.

St. Mary's was established as a mission of the Protestant Episcopal Church In the United States of America ("PECUSA") in the early 1930's, and was incorporated under the laws of the State of Colorado in 1934. Title to

its real property consistently has been held in the name of its corporate entity, St. Mary's Church, a Colorado nonprofit corporation. App. 37a. St. Mary's was recognized in 1954 as a parish of PECUSA. As a condition of parish status, the membership of St. Mary's adopted a resolution acceding to the constitutions of the national church and of the Diocese of Colorado, recognizing the authority of the General Convention of PECUSA, the policy-making body of the national church, and promising obedience to the canons of the national church and of the diocese. App. 38a. In 1955, the year after it became a parish, St. Mary's revised its articles of incorporation to reflect the accession to PECUSA. App. 38a-39a. St. Mary's also adopted corporate by-laws which, in an article captioned "Accession," provided that "[t]he parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan." App. 89a. Neither the articles of incorporation nor the by-laws were amended or altered until 1976, when a two-thirds majority of the membership of St. Mary's, in accordance with the Colorado Nonprofit Corporation Act,[1] voted to disaffiliate from PECUSA. App. 39a; *see* App. 62a.

Beginning in the early 1970's, a number of doctrinal controversies arose within the Episcopal Church. The resolution of these controversies by the General Convention of the Episcopal Church precipitated a division in the St. Mary's membership. On November 28, 1976, at a meeting of St. Mary's, the members voted 197 to 79 to disaffiliate and withdraw their parish from PECUSA. In compliance with the Colorado Nonprofit Corporation Act, the two-thirds majority amended the articles of incorporation to reflect the disaffiliation. App. 39a. From the time of its withdrawal from the Episcopal Church, the withdrawing majority, comprising the nonprofit corporation of St. Mar-

[1] Colorado Revised Statutes §§ 7-50-101 to -114 (1973 & Supp. 1985).

y's Church, has continued in possession of the local church's property (App. 40a), all of which was bought, operated and maintained over the years solely out of St. Mary's corporate funds, with no contribution or other financial support from PECUSA or the Diocese of Colorado (App. 70a).

Following the majority's disaffiliation, the Bishop and Diocese formally recognized the loyalist minority of St. Mary's as representing the parish.[2] App. 40a. The Diocese of Colorado, speaking through the Diocesan Executive Council, then adopted a resolution declaring that the Diocese

> "does not approve or recognize the action taken by St. Mary's Church to withdraw from the Diocese of Colorado, supports those members of St. Mary's Church who voted against such withdrawal, and affirms its ecclesiastical ties and its rights with respect to the non-profit corporation known as St. Mary's Church." *Id.*

Shortly thereafter, the Bishop and the Diocese, and the governing board of the minority faction, brought suit to dispossess the withdrawing majority of all of its real and personal property. App. 40a-41a.

At and before the time of withdrawal, neither the canons nor the constitutions of PECUSA or the Colorado Diocese contained any provision dealing expressly with the question of ownership or control of property of a local church that chooses to withdraw from the denomination. Nor did the deeds to the church property address that

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[2] Petitioners do not contest the fact that the Bishop and Diocese could recognize the loyalist minority as an Episcopal parish of the Diocese. They dispute, however, the assertion that either PECUSA, the Diocese or the loyalist minority board or vestry has legal authority to govern the secular affairs of St. Mary's church, a Colorado nonprofit corporation, including its ownership of property.

question. *See* App. 69a-70a. In 1979, two years after the commencement of this litigation, PECUSA adopted a canon that specified that all parish property would thereafter be held in trust for the national church and the diocese in which it is located. App. 73a; *see* App. 93a, Title I, Canon 6, § 4.

The trial court held that the minority faction was entitled to the local church property. App. 20a. Applying the "polity" or "compulsory deference" rule of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the trial court held that the Episcopal Church was hierarchical as to both doctrinal and temporal matters, that the court was required to defer to the decisions of authoritative church tribunals within PECUSA, and that it must therefore enforce the decision of the Diocese, which recognized the loyal minority faction as the "true" St. Mary's Church and as entitled to the property. *See* App. 13a-20a.

The Colorado Court of Appeals reversed, holding that the trial court erred in applying the "compulsory deference" rule. According to the court of appeals, such "unquestioning deference to the diocesan decision which recognized the minority bordered on violating the establishment of religion clause of the First Amendment." App. 32a. Instead, the court of appeals employed the "neutral principles" analysis, which was most recently discussed by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), as a guide for judicial review of church property disputes. App. 29a. Applying *Jones*, the Colorado Court of Appeals adopted a "presumptive rule of majority representation," defeasible upon a showing that the parties intended to create a trust over the local church property in favor of the general church. App. 30a. Upon conducting the analysis required by *Jones*, the court found nothing in the deed, the articles of incorporation, the by-laws, or the canons or constitutions of the national church or the Colorado Diocese indicating that the local church had formally relinquished control over its property to the Diocese. App.

32a. Therefore, the court of appeals held that the majority was entitled to control and possession of the local church property. App. 33a.

The Colorado Supreme Court granted certiorari. Although it agreed with the court of appeals that neutral principles of law should be applied in resolving the church property dispute, it disagreed with the manner in which that court applied the standard in this case. App. 60a. The Colorado Supreme Court rejected the presumptive rule of majority representation. In addition, and of more importance, the court held that in applying the neutral principles analysis to the relevant evidence in this case, the court of appeals too narrowly restricted the scope of the permissible inquiry. App. 62a.

Without the application of any presumption, the Colorado Supreme Court considered whether the instruments of conveyance, church documents and "other relevant evidence" established that the general church had ownership or control over the disputed church property by reason of a trust, a reverter clause, "or some other basis." App. 61a. No provision was found in either the documents of purchase or the constitution and canons of the Episcopal Church or the Diocese of Colorado expressly providing that the property of a withdrawing parish would revert to, or be held in trust for, the Episcopal Church or the Diocese. App. 73a. Nor was any provision found in those documents expressly providing that, in the event of a dispute within a parish, title to, or possession and control of, local church property would reside in the faithful minority faction. App. 73a-78a. However, the court did find "an intent on the part of the local church corporation to dedicate its property irrevocably to the purposes of PECUSA" (App. 70a-71a), and concluded that an "express trust created by implication in fact" over local church property existed in favor of the general church. App. 69a-70a and n.14. The court held, therefore, that the faithful minority was entitled to

possession and control of the property of the local church corporation.

On February 24, 1986, the Colorado Supreme Court denied Petitioners' timely petitions for rehearing. App. 84a. This petition for writ of certiorari followed.

Because judicial intervention in church property disputes implicates the First Amendment establishment and free exercise clauses, the federal question sought to be reviewed here was raised consistently throughout the litigation.[3]

REASONS FOR GRANTING THE WRIT

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church,* 393 U.S. 440 (1969) (*"Presbyterian Church I"*), this Court observed that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* at 449. The neutral principles analysis was refined on remand in *Presbyterian Church v. Eastern Heights Church,* 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied sub nom. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church,* 396 U.S. 1041 (1970), and again in *Carnes v. Smith,* 236 Ga. 30, 222 S.E.2d 322, *cert. denied,* 429 U.S. 868 (1976), where the Georgia Supreme Court examined matters such as the deeds to the disputed church properties, state statutes dealing with implied trusts, the denomination's constitution and the corporate charter to determine whether there was

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[3] Beginning with Defendants' (Petitioners') answer, which stated in the sixth defense to Plaintiffs' (Respondents') second cause of action that "Plaintiffs' claims are barred by the First and Fourteenth Amendments to the United States Constitution", all of the pleadings raised the constitutional issue sought by Petitioners to be reviewed here, and that issue was briefed and argued throughout the trial and appellate proceedings below.

any basis for finding that a trust had been created over local church property in favor of the general church.

In the years following *Presbyterian Church I*, confusion plagued state courts in applying the neutral principles analysis.[4] Presumably, that confusion and the misapplication of the neutral principles analysis by some courts led to the grant of certiorari in *Jones v. Wolf*.[5]

In *Jones*, this Court addressed two issues that may arise in church property cases: (1) how to determine whether property titled to the local church is held by the local church in trust for the national denomination; and (2) where the property is not held in trust for the denomination, how to determine which of two competing factions in the local church is entitled to possession and control of the property. As to the first, the Court said that, although

> "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice * * * [and] [a]s a corollary . . . requires that civil courts defer to the resolution of issues of religious doctrine or polity by the Highest court of a hierarchical church organization * * *, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt *any* one of various approaches for settling church property

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[4] That confusion was predicted by, and the subject of, a number of scholarly articles. *See, e.g.*, Casad, *Church Property Litigation: A Comment on the Hull Church*, 27 Wash. & Lee L.Rev. 44, 63 (1970); Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View*, 1975 U.Ill.L.F. 543, 557 (1975); Comment, *Serbian Eastern Orthodox Diocese v. Milivojevich, The Continuing Crusade for Separation of Church and State*, 18 Wm. & Mary L.Rev. 655, 664 (1977).

[5] 443 U.S. 595 (1979), *on remand*, 244 Ga. 388, 260 S.E.2d 84, *cert. denied*, 444 U.S. 1080 (1980).

> disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" 443 U.S. at 602 (*quoting Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970)) (emphasis in original) (citations omitted).

The Court identified the "neutral principles of law" approach as one such analysis, 443 U.S. at 602, and provided a general outline of the analysis and how it should operate. *Id.* at 603-06.

The Court also addressed the second issue, which it described as "a significant complicating factor"—the task of deciding which of two factions in a divided local church would have control over its property in the event the property was not being held in trust for the national denomination. *Id.* at 606-07. Observing that the lower courts in *Jones* had merely assumed, without analysis or discussion, that the local majority controlled, the Court again resorted to the neutral principles approach. In the Court's view, a state could adopt, consistent with neutral principles,

> "a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, * * * so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 607-08 (footnote omitted).

Since *Jones*, lower courts have attempted to apply the Court's guidance, both in choosing between deference and neutral principles approaches and, in cases where the latter course was selected, in applying the neutral principles analysis. Unfortunately, there has been substantial disagreement over how this Court intended the neutral principles

analysis to be applied.[6] Framed differently, the controversy has concerned what evidence may be considered in applying the neutral principles approach, and what inferences permissibly may be drawn from the application of those neutral principles to the evidence. These are not matters purely of state law under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which merely call upon state courts to apply their own respective trust principles and rules of evidence. Rather, because the principles to be applied, the evidence to be considered and the inferences to be drawn implicate constitutional interests, and because the failure to properly apply the neutral principles analysis risks impermissible judicial entanglement with nonsecular, ecclesiastic matters, there are certain basic tenets under *Jones* from which state courts should not be permitted to stray.

The decision of the Colorado Supreme Court manifests each of these difficulties and represents the latest example of a lengthy and growing list of conflicting decisions by state courts attempting to interpret the limits of authorized judicial inquiry when seeking to resolve church property disputes under the neutral principles approach. For the following reasons, Petitioners respectfully submit that this Court should grant certiorari here both to correct the error of the court below and to provide needed guidance regarding application of the neutral principles analysis.

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[6] Commentators disagree even as to the purpose that the neutral principles approach should serve. Some argue that it should be used to determine through secular interpretation of religious documents the intention of the parties regarding control of church property, *see* Comment, *Church Property Disputes: The Trend and the Alternative*, 31 Mercer L.Rev. 557, 575 (1980) (hereinafter "Comment"), while others assert that it should not be used to determine intent from religious instruments, *see* Sirico, *The Constitutional Dimensions of Church Property Disputes*, 59 Wash.U.L.Q. 1, 4-6 (1981) (hereinafter "Sirico").

1. The Decision Below Misapplies The Neutral Principles Analysis Of *Jones v. Wolf* And Thereby Violates Petitioners' Rights Under The Establishment And Free Exercise Clauses Of The First Amendment.

While professing to adopt the neutral principles approach, the Colorado Supreme Court in fact went considerably beyond the limits of the analysis that this Court described in *Jones v. Wolf.* In the Colorado Supreme Court's view, "the court of appeals too narrowly restricted the scope of the permissible inquiry" (App. 62a) and "incorporat[ed] an unduly restrictive rule of evidence, *see Jones v. Wolf,* 443 U.S. at 610-21 (Powell, J., dissenting), precluding the trial courts from considering evidence relevant to a church property dispute that is *not couched in the traditional forms and language of trust law.*" App. 63a (emphasis added). Instead, the court opted to consider "whether the instruments of conveyance, church documents and *other relevant evidence* establish that the general church has rights of ownership and control over the disputed church property by reason of a trust, a reverter clause, *or some other basis.*" App. 61a (emphasis added).

By considering evidence that was not "couched in the traditional forms and language of trust law," the Colorado Supreme Court allowed its property determination to be influenced by nonsecular matters of church doctrine, polity and practice, including:

- vows of accession by St. Mary's "to the Constitution and Canons of [PECUSA] . . ., and the Ecclesiastical Authority and Canons of the Diocese of Colorado" (App. 71a-73a, 75a; *see* App. 88a-91a), and promises "of conformity to the Doctrine, Discipline and Worship of The Church" (App. 75a; *see* App. 90a);
- the provision in St. Mary's by-laws that "[t]he parish shall have control of its own local affairs but nothing shall be done that conflicts

with the canons of the church, either General or Diocesan" (App. 72a-73a, 89a; *see* App. 89a);

- St. Mary's acknowledgment of its status as a local unit within the Episcopal Church, and its acceptance of the benefits of Episcopal affiliation for over 40 years (App. 72a);
- St. Mary's active role in diocesan affairs, including sending representatives to the diocesan conventions, accepting appointments to and holding positions on committees of the Diocese, and submitting reports on religious rites, salaries and the value of property (App. 72a);
- the use of property ("temporalities") of the national church in the parish to carry on religious work (App. 71a; *see* App. 88a);
- the setting of parish boundaries by PECUSA for geographical places of worship (App. 74a; *see* App. 93a-94a);
- the prohibition of any worldly or common use of dedicated or consecrated churches and chapels (App. 75a; *see* App. 94a-95a);
- the use of buildings, chapels and houses of worship, and the opening of the same only for services, rites and ceremonies as are authorized or sanctioned by PECUSA or the Bishop Ordinary (App. 77a; *see* App. 91a-92a);
- the authority of the Bishop to visit congregations to inspect "the behavior of the clergy and [to] examine[ ] general physical and financial conditions" (App. 77a);
- the power of the Bishop to dissolve a parish when it no longer supports the rector, and

reversion of parish property under those circumstances to the Bishop and Diocese of Colorado (App. 76a-77a; *see* App. 91a); and

— the Diocesan Executive Council's duty and power to direct the "carrying out of the programs and policies for the Diocese as adopted by the Annual Diocesan Convention" (App. 78a; *see* App. 90a).

From these provisions, the court found "a unity of purpose on the part of the parish and the general church reflecting the intent that property held by the parish would be dedicated to and utilized for the advancement of the work of PECUSA." App. 79a.

Consideration of these matters violated *Jones'* mandate that courts, in determining whether a trust exists, "take special care to scrutinize the document in *purely secular terms.*" *Jones v. Wolf,* 443 U.S. at 604 (emphasis added). The neutral principles analysis

> "relies *exclusively* on objective, well-established *concepts of trust and property law familiar to lawyers and judges.* It thereby promises to free civil courts from entanglement in questions of religious doctrine, polity, and practice. * * * Through appropriate *reversionary clauses and trust provisions,* religious societies can *specify* . . . what religious body will determine the ownership [of church property] in the event of a schism or doctrinal controversy.
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> "* * * The neutral principles method . . . requires a civil court to examine certain religious documents, such as a church constitution, for *language of trust in favor of the general church.* In undertaking such an examination, a civil court must take *special care to scrutinize the document in purely secular terms,* and *not to rely on re-*

> *ligious precepts* in determining whether the document indicates that the parties have intended to create a trust." *Id.* at 603-04 (emphasis added).[7]

The Colorado Supreme Court transgressed these guidelines. In according significance to the general vows of accession and promises of conformity to doctrine contained in St. Mary's by-laws, it moved from the secular to the nonsecular.[8] In relying on St. Mary's acceptance of benefits

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[7] "Mr. Justice Blackmun's construction represented an attempt to remove from civil adjudication all 'quintessentially religious' questions." Adams and Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U.Pa.L.Rev. 1291, 1318 (1980) (hereinafter "Adams and Hanlon") (footnote omitted), *quoting Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696, 713 (1976). *See also Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presb. Ch.*, 507 Pa. 255, 266, 489 A.2d 1317, 1323, *cert. denied*, 106 S.Ct. 198 (1985) ("What is involved here is a pristine question of property control. . .").

[8] Vows of accession and promises of conformity to doctrine are inherently ecclesiastical in nature. Moreover, they are not necessarily relevant even under the deference approach of *Watson v. Jones* since a denomination may be hierarchical with respect to doctrinal matters, yet congregational or democratic regarding ownership and control of property. *See* Adams and Hanlon, *supra* note 7, 128 U.Pa.L.Rev. at 1330-32. *See, e.g., Kelley v. Riverside Blvd. Ind. Church of God*, 44 Ill.App.3d 673, 683-84, 358 N.E.2d 696, 704 (1976); *Maryland and Va. Eldership v. Church of God*, 249 Md. 650, 663-66, 674, 241 A.2d 691, 698-703, 705 (1968), *vacated*, 393 U.S. 528 (1969), *on remand*, 254 Md. 162, 254 A.2d 162 (1969), *appeal dismissed*, 396 U.S. 367 (1970); *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 861-62, 422 N.E.2d 1337, 1342 (1981); *Piletich v. Deretich*, 328 N.W.2d 696 (Minn. 1982).

Title I, Canon 12, Section 3(c) of PECUSA's Canons states: "This Canon shall not affect the legal rights of property of any Parish or Congregation." *See* App. 93a. The Maryland Court of Appeals recognized the Protestant Episcopal Church in Maryland as being of mixed polity, i.e., congregational with respect to property and hierarchical with respect to ecclesiastical matters. *See Maryland and Va. Eldership v. Church of God*, 294 Md. at 671, 241 A.2d at 707. Other courts have

of Episcopal affiliation for over 40 years, its active role in diocesan affairs[9] and the prohibition of use of dedicated or consecrated churches for worldly or common affairs, the court ventured into the forbidden arena of church polity and practice. As this Court observed in *Jones*, in some cases an examination of church polity and administration might reveal which unit of church government has ultimate control of church property. *Id.* at 605.

> "But in others, the locus of control would be ambiguous, and '[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association.' Post, at 619-620, 61 L Ed 2d, at 795. In such cases, the suggested rule would appear to require 'a searching and therefore impermissible inquiry into church polity.' Serbian Orthodox Diocese, 426 U.S., at 723." 443 U.S. at 605.[10]

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concluded that PECUSA is hierarchical as to both doctrinal and property matters. *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. 572, 580, 417 A.2d 19, 24 (1980), *cert. denied*, 449 U.S. 1131 (1981); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 96 Nev. 399, 402, 610 P.2d 182, 184 (1980); *Bennison v. Sharp*, 121 Mich.App. 705, 718, 329 N.W.2d 466, 472 (1982).

[9] Such participation in diocesan affairs consisted of resolutions regarding ecclesiastic matters such as ordination of women as priests, abortion, use of the American Standard Version of the Bible, and use of the New Roman Rite in the service of Holy Communion. App. 103a, 101a, 100a, 98a.

[10] *See also Maryland and Va. Churches v. Sharpsburg Church*, 396 U.S. at 369-70. *Compare Parent v. Roman Catholic Bishop of Portland*, 436 A.2d 888, 891 (Me. 1981) ("Ascertaining the content of any such . . . trust—express or implied * * * would have required the court to draw inferences from the conduct of both parties over the years in giving and receiving contributions to the church. Such inquiries would have embroiled the court in extensive consideration of religious doctrine, polity and administration.") *with Bennison v. Sharp*, 121

The virtue of the neutral principles analysis, when properly applied, is that it "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Id.*

Here, the Colorado Supreme Court fell into the very trap of which this Court warned in *Jones*. Viewing the documents most favorably to the Colorado court's analysis, the locus of control over St. Mary's property was ambiguous, resulting in the court's extensive inquiry into church polity and practice and the allocation of power within the church in order to determine where religious law placed control over church property. Viewed more realistically, there simply was no language of trust, expressed in "concepts of trust and property law familiar to lawyers and judges," *id.* at 603, or "embodied in some legally cognizable form."*Id.* at 606.

The Colorado Supreme Court went to great lengths to try to justify its interpretation of neutral principles under *Jones*. First, although acknowledging that the majority in *Jones* "preferr[ed] a narrow restrictive express trust version of the neutral principles analysis" (App. 63a), it said that a "narrow inquiry is not constitutionally mandated," *id.*, so long as the court's analysis "involves no *resolution* of doctrinal matters. 443 U.S. at 602, 608." App. 63a (emphasis added). Yet, the Colorado court's reference to *Jones* was erroneous for, in *Jones* and its forerunners,[11]

Mich.App. 705, 329 N.W.2d 466 (1982) (where court, applying deference approach, found that no searching inquiry occurred despite trial court's reliance on matters such as vows of accession and local church's acquiescence to denomination's policies, and despite absence of anything in deeds or church documents indicating what was intended to happen to local church property upon withdrawal from the denomination).

[11] "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine." *Maryland and Va. Churches v. Sharpsburg Church*, 396 U.S.

this Court stated not merely that there could be no "resolution," but that there could be "no *consideration* of doctrinal matters." 443 U.S. at 602 (emphasis added); *see also id.* at 608.

Second, the court said, "even if this court is searching only for evidence of a trust relationship * * * [t]here is no need to restrict the inquiry * * * to a search for explicit language of express trust. . . ." App. 63a-64a. Instead, the court suggested that it could "consider[ ] documents not traditionally associated with trust and property law, or provisions in documents not solely couched in the traditional terms of trust and property law. . . ."[12] App. 64a. Building on these premises, the Colorado Supreme Court reasoned that *Jones* "does not require the civil courts to shy away from those documents, or provisions in documents, that intertwine religious concepts with matters otherwise relevant to the issue of who controls the property." App. 65a.[13] Yet, in pursuing that tortuous path, the Colorado Supreme Court ignored the very purpose of the neutral principles analysis: to exclude from examination any evidence regarding church polity unless, as Justice Powell observed in his dissenting opinion in *Jones*, it has been "stated *in express relation to church property, in the language of trust and property law.*" 443 U.S. at 612 (foot-

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at 369. *See also Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. at 710; *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. at 449; *Gipe v. Superior Court*, 124 Cal.App.3d 617, 627-28, 177 Cal.Rptr. 590, 595 (1981); *Bernson v. Koch*, 35 Col.App. 257, 263, 534 P.2d 334, 337 (1975); *Southside Tablernacle v. Pentacostal, etc.*, 32 Wash.App. 814, 817-18, 650 P.2d 231, 233 (1982).

[12] *Compare* App. 29a, where the court of appeals stated that such provisions must pertain *directly* to church property.

[13] Some commentators concur in the view of the court below that the neutral principles approach permits, and even requires, a court to inquire into matters of church polity or doctrine in resolving church property disputes. *See, e.g.*, Note, *Jones v. Wolf: Neutral Principles Standard of Review for Intra-Church Disputes*, 13 Loy.L.A.L.Rev. 109, 125 n.79, 128 (1979).

note omitted)(emphasis added). For, as Justice Powell further commented, the neutral principles approach operates as "a restrictive rule of evidence," *id.* at 611, that forbids courts from considering evidence of church polity that "ha[s] not been expressed in secular terms of control of [church] property." *Id.* at 613. "[W]henever religious polity has not been expressed in specific statements referring to the property of a church, there will be no evidence of that polity cognizable under the neutral-principles rule." *Id.* at 612-13. Commentators have similarly observed that the neutral principles approach requires courts to refrain from considering evidence from church constitutions and other religious documents unless it has been stated in secular terms with explicit reference to the church property and the circumstances in which it is to be held in trust.[14]

If certiorari is granted, we will argue that the court below should have restricted its inquiry to determining only (1) whether there were provisions in the church canons, constitutions and by-laws that related to the control of local church property in the event of the withdrawal of a local church from the denomination,[15] (2) if so, whether

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[14] *See, e.g.*, Comment, *Constitutional Law: Neutral Principles of Law and Majority Rule Presumption Applied in Disputes Over Church Property*, 19 Washburn L.J. 590, 599 (1980) (*Jones'* neutral principles approach "necessitat[es] an express statement in secular terms how membership is to be determined in the event of a schism.") (footnote omitted); Note, *Church Property Dispute Resolution: An Expanded Role for Courts After Jones v. Wolf?*, 68 Geo.L.J. 1141, 1162 (1980) (hereinafter "Note"); Adams and Hanlon, *supra* note 7, 128 U.Pa.L.Rev. at 1326. *See also Grutka v. Clifford*, 445 N.E.2d 1015, 1020 (Ind.Ct.App. 1983), *cert. denied*, 465 U.S. 1006 (1984) (consideration of provisions of church constitution relating to property ownership that are "intermingled with religious concepts" would amount to "probing deeply" into ecclesiastic matters.)

[15] The court below erred even in its consideration of certain secular, property-related provisions of the church constitution and canons. For example, in considering a diocesan canon that required a parish to obtain consent of the Diocesan Executive Council before the parish

they were expressed in reversionary clauses, trust provisions and other language of trust and property law familiar to lawyers and judges and cognizable under the neutral principles approach, and (3) whether such provisions clearly reflected an intent of the parties to create a trust over local church property in the event of the local church's disaffiliation from the denomination. Had the court done so, we believe that it would have been compelled to conclude that no trust existed in favor of the national denomination, for none of the provisions on which the court relied dealt with the question of how local church property was to be treated in the event of a parish's disaffiliation, and none stated expressly or even by clear implication[16]

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could incur an indebtedness that might encumber or alienate parish property, the court ignored an Annual Report of the Board of Trustees (App. 96a-97a), which reflected that the provision did not create a trust on behalf of the Diocese of the property of St. Mary's; rather, the provision was intended to allow the Diocese to review prospective loans in order, among other things, to ascertain that the loan would not, in the event the parish was unable to satisfy its obligations under the loan, "impose a moral obligation on the Diocese where none [was] intended." *See* App. 97a. Moreover, this canon indicated a measure of *negative* control over the local church property while it was part of the denomination but, like other provisions governing a member local unit, was not effective upon, and did not reflect the parties' intent in the event of, disaffiliation. *See Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 932-33, 152 Cal.Rptr. 854, 867-68, *cert. denied*, 444 U.S. 974 (1979) (even more extensive powers of a general denomination over local church property held not to create a trust or provide a basis for control of local church property in favor of the general denomination); *Foss v. Dykstra*, 342 N.W.2d 220, 224-25 (S.D. 1983) ("Although these provisions may limit a local church's use of the property while it is a member of the denomination, the language does not go far enough to constitute trust or reversionary terms such as the Supreme Court was seeking in *Jones* [*v. Wolf*]"); and cases cited in note 24 *infra*.

[16] The burden is on the party who asserts the existence of a trust to provide clear and convincing evidence of its existence and of the settlor's proper manifestation of his intent to create such a trust. Bogert, *Trusts and Trustees*, §§ 49, 50 (2d ed. 1984); *Restatement of the*

that the property was to be held in trust either for the national denomination or the local minority faction should a schism occur.[17] The lower court's consideration of other, forbidden matters of church polity and practice under the guise of applying the neutral principles analysis tainted its decision, deprived Petitioners of the place of worship which they built solely with their own work and funds and in which they have worshipped for more than a quarter century, and reflects the need for further guidance from this Court on the proper mode of applying the neutral principles analysis.

2. The Lower Courts Are In Conflict And Confusion Concerning The Neutral Principles Analysis Of *Jones v. Wolf*, And Need Further Guidance From This Court

Decisions since *Jones v. Wolf*, including the opinion below, reflect that the lower courts are in conflict and confusion regarding the proper application of the neutral principles analysis. This condition threatens important federal constitutional rights not merely because of the possible improper application of neutral principles but, more importantly, because it permits state courts to shape their application of the neutral principles analysis in church property cases to conform to their particular view of church doctrine and how church property should be disposed.

Law of Trusts, Second, § 39 (1959). Colorado law is in accord. *See Morgan v. Wright*, 156 Colo. 411, 415, 399 P.2d 788, 790 (1965). *See, e.g., Presbytery of Beaver-Butler of the United Presbyterian Church v. Middlesex Presb. Ch.*, 507 Pa. at 269, 482 A.2d at 1324 (" 'A trust must be created by clear and unambiguous language or conduct, it cannot arise from loose statements admitting possible inferences consistent with other relationships.' "(citation omitted); *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d at 932, 152 Cal.Rptr. at 868.

[17] *See, e.g., Antioch Temple, Inc. v. Parekh*, 383 Mass. at 867-68, 422 N.E.2d at 1346 (in conducting purely secular examination under neutral principles analysis of by-laws, articles of incorporation and deeds, court found that there was no provision for a reversion of the local church's property to the denomination upon the local church's withdrawal).

Commentators have echoed these concerns in noting the disarray among lower court decisions since *Jones*, and have called for further clarification by this Court of its neutral principles analysis. In a leading article in 1980, Judge Arlin Adams forecasted that "*Jones v. Wolf* is likely to promote greater uncertainty and confusion among state courts concerning the permissible forms and limits of judicial intervention in church-property disputes."[18] According to Judge Adams, a principal source of the confusion, and

> "[t]he main difference . . . between . . . the majority and the dissent in *Jones v. Wolf* centers not on the ultimate goal of judicial inquiry, but rather on the scope of 'legally cognizable evidence' of church intent regarding control of its property. * * * The critical distinction that must be drawn, however, lies between a strictly secular inquiry into these sources, designed solely to accord legal effect to the private arrangements of a religious association respecting property, and a more extensive reading of these sources in religious terms that would require a judicial evaluation of matters of ecclesiastical faith and doctrine." 128 U.Pa.L.Rev. at 1328, 1329.[19]

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[18] Adams and Hanlon, *supra* note 7, 128 U.Pa.L.Rev. at 1334. "*Jones v. Wolf* is bound to become the focus of much debate," for "the Court's opinion appears to raise as many questions as it answers concerning the limits of authorized judicial review in church-property disputes." *Id.* at 1296, 1313.

[19] One author has argued that the neutral principles analysis, lacking clear evidentiary standards, risks intrusion into constitutionally forbidden areas. *See* Sirico, *supra* note 6, 59 Wash.U.L.Q. at 53-56. "[A] neutral principles court must also examine documents and risk illicit inquiry, particularly if it goes beyond bare legal title. * * * Whether or not a court should construe [a] controverted word or defer to the interpretation of the denomination is a close question. Because no rule clearly defines the limits of intrusion, risky inquiries and unwitting entanglements can plague a court that seeks to separate the secular wheat from the religious chaff." *Id.* at 55.

Other commentators have also noted the confusion that *Jones* has left in its wake.[20]

As predicted by Judge Adams, the seven years since *Jones* have seen the state courts in conflict and confusion over the proper interpretation and application of the neutral principles analysis. Illustrative of this confusion are the varying conclusions that state courts have reached under the neutral principles approach regarding control of local church property in cases arising within the same denomination. For example, in *Babcock Memorial Presbyterian Church v. The Presbytery of Baltimore*, 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984), the Court of Appeals of Maryland awarded an interest in property titled to the local church to the denomination, the United Presbyterian Church in the United

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[20] *See, e.g.*, Comment, *supra* note 6, 31 Mercer L.Rev. at 574 ("The Court's decision in *Jones* can only lead to increased civil litigation in church property disputes, more uncertainty, and the propagation throughout the states of a variety of different rules for deciding church property disputes."); Sirico, *supra* note 6, 59 Wash.U.L.Q. at 61-62 ("Neither [*Watson* nor neutral principles] offers a well defined, restrictive rule of evidence or inquiry that promises a comfortable margin of error to reduce the danger of unconstitutional methodology. * * * Given the need for some judicial review, courts require a methodology so they can render legally consistent determinations."); Ellman, *Driven From The Tribunal: Judicial Resolution Of Internal Church Disputes*, 69 Cal.L.Rev. 1378, 1397, 1408-09 (1981)("no clear rule has emerged from *Jones*, however, because the Court was closely divided and the majority opinion left many questions unanswered. * * * *Jones*' limits on independent judicial consideration of church rules * * * are an effort to keep courts from deciding questions of religious doctrine, but have resulted mostly in confusion. * * * *Jones* does not . . . offer guidance on how to determine whether a term is sufficiently secular to permit judicial construction and application. *Jones*' limitations are efforts to prohibit courts from deciding doctrinal issues, but they are too confused conceptually to provide much help on this serious point."); Comment, *Judicial Resolution Of Church Property Disputes*, 31 Ala.L.Rev. 307, 328, 332 (1980) ("the Court [in *Jones*] did not elaborate on the intricacies of the neutral principles of law analysis. * * * [T]he constitutional role civil courts must assume in these disputes remains uncertain.")

States of America ("UPCUSA"), basing its decision on the denomination's Book of Order, even though the constitution of the general church provided no penalty or forfeiture upon such property and contained no provision expressing any trust on such property for the denomination. A similar result was reached by the Supreme Court of Iowa in *Fonken v. Community Church of Kamrar*, 339 N.W.2d (810, 818 (Iowa 1983), where the court held that provisions of the Book of Order gave UPCUSA "exclusive ultimate control of the uses and disposition of local church property."

In contrast, the courts of South Dakota, Missouri, New York and California, while also applying the neutral principles analysis, have held to the contrary in church property cases arising within UPCUSA. In *Foss v. Dykstra*, 342 N.W.2d at 224-25, the Supreme Court of South Dakota concluded that, although the Book of Order might limit a local church's use of its property while it is a member of the denomination, it did not go far enough to create a trust or reversionary interest, express or implied, in favor of the national church. The same conclusion was reached in *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 105 S.Ct. 2361 (1985), in *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of Am.*, 62 N.Y.2d 110, 464 N.E.2d 454, 476 N.Y.S.2d 86, *cert. denied*, 105 S.Ct. 514 (1984), and in *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 152 Cal.Rptr. 854. In *Riverside*, which involved almost identical facts to those involved in *Babcock*, the court held that the local church was the absolute owner of its property, that the local church had a right to withdraw from UPCUSA, and that the denomination did not have any interest, by way of trust or otherwise, in the local church's property.

Perhaps an even more telling indication of the lower courts' confusion over the proper application of the neutral principles analysis and its restrictive rule of evidence is the varying significance that courts have accorded to the

supposed indicators of a trust relationship. Factors viewed by some courts, including the court below, as indicating an intent to create a trust have been held by other courts neither to reflect such an intent nor to be within the bounds of permissible judicial scrutiny under the neutral principles approach:

- vows of accession by the local church, and provisions in the general church's constitution that the general church shall determine matters of controversy and that the constitution, canons and discipline of the general church shall prevail over anything repugnant in the local church's articles of incorporation or by-laws;[21]

- provision empowering the general church to dissolve, take over the management of, or hold in trust the property of a local church in the event of abandonment or dispersal of its members, or should the local church's governing board become unable or unwilling to manage the affairs of its church;[22]

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[21] *Compare* App. 71a-78a *with Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d at 474 (provision vesting power in judicatory of general church made "no specific reference to a property dispute between the national church and a local church which has disaffiliated") *and Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 115 Cal.App.3d 599, 622-23, 171 Cal.Rptr. 541, 554, *cert. denied*, 454 U.S. 864 (1981) ("Such declarations are a far cry from an express trust in church property for the benefit of the Diocese and PECUSA.")

[22] *Compare* App. 76a-77a; *Fluker Community Church v. Hitchens*, 419 So.2d 445, 448 (La. 1982) (trust found where general church's discipline provided for reversion of local church property to denomination if local church disbanded); *and Fonken v. Community Church of Kamrar*, 339 N.W.2d at 818 (power to take over local church government found to reflect national church's power over local church property) *with Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d at 471-74 (such powers not sufficient to create trust in favor of general church); *First*

— long term affiliation of the local church with the denomination;[23]

— provisions in the general church's canons providing that the local church may not, without written consent of the general church, sell, mortgage, lease or otherwise encumber any of its real property, or acquire real property subject to an encumbrance;[24]

Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of Am., 62 N.Y.2d at 124, 464 N.E.2d at 463, 476 N.Y.S.2d at 94 (such provisions "relate only indirectly to the control of property" and would force the court to inject itself into the ecclesiastic dispute, and therefore do not support the implication of a trust); *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d at 930, 152 Cal.Rptr. at 866-67 (no trust found since local church, while having seceded from the denomination, had not been abandoned, and its members had not dispersed); *Foss v. Dykstra*, 342 N.W.2d at 223-25 (power of general church over local church property in event of dissolution not found to create basis for implication of trust over local church property in event of secession). *Cf. Carnes v. Smith*, 236 Ga. at 37 n.13, 222 S.E.2d at 327 n.13 (in pre-*Jones* case, court distinguishes between provisions regarding reversion of local church property if the local church should "become extinct, or cease to be," and those that govern control of property if the local church withdraws from the denomination).

[23] *Compare* App. 72a *with Coles v. Wilburn*, 241 Ga. 322, 323, 245 S.E.2d 273, 274 (1978) (in pre-*Jones* neutral principles case, court finds fifty year affiliation inadequate, without more, to support existence of trust); *and First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of Am.*, 62 N.Y.2d at 125, 464 N.E.2d at 463, 476 N.Y.S.2d at 95 (200 year affiliation does not, by itself, support finding of implied trust).

[24] *Compare* App. 74a, 76a; *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. at 580-81, 417 A.2d at 24 (general church's power to approve or disapprove encumbrance of local church property seen as indication of trust relationship); *and Fluker Community Church v. Hitchens*, 419 So.2d at 448 (trust found where general church's discipline provided that transfer of local church property must be approved by denomination) *with Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d at 471 and n.3, 474 ("that section, too, is silent

— conformance of the local church to financial requirements of the diocese, such as filing annual financial reports;[25] and

— amendment of the general church's constitution, *after* withdrawal of the local church, to provide expressly for a trust over local church property.[26]

The varying significance that has been accorded to these factors results from the lower courts' disagreement regarding what evidence may be considered under the neutral principles approach and what inferences may be drawn from such evidence, and accounts for the conflicting decisions that the courts have rendered. These disparate re-

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with regard to any reversionary or trust interest of the national church with respect to the property of a local church which has disaffiliated"); *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d at 932, 152 Cal.Rptr. at 867 (such provisions not sufficient to create trust); *Foss v. Dykstra*, 342 N.W.2d at 223-24 (such provisions provide no basis for express or implied trust).

[25] *Compare* App. 72a *with Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 115 Cal.App.3d at 625, 171 Cal.Rptr. at 555 (local church's conformance to financial requirements of diocese did not create trust). *Cf. Antioch Temple, Inc. v. Parekh*, 383 Mass. at 864, 422 N.E.2d at 1344 (parent church's purpose to " 'supervise, assist, finance and otherwise direct the spiritual and material well-being of [its congregations]' " does not deprive local unit of "power to govern itself in matters such as . . . its control and use of its own property.")

[26] *Compare* App. 73a n.15 *and Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. at 581, 417 A.2d at 24 ("it reflects established customs, practices and usages of The Protestant Episcopal Church") *with Foss v. Dykstra*, 342 N.W.2d at 224-25 n.6 (adoption of express trust amendment after local church had disaffiliated was not a reflection of longstanding relationship and "provides additional support to our conclusion that the Book of Order as it existed on [the date of disaffiliation] did not contain provisions creating a trust over local property") *and Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presb. Ch.*, 507 Pa. at 267-68, 489 A.2d at 1223-24 (no trust found where amendment was adopted after local church's secession).

sults, in cases having substantially similar facts, and often affecting local churches of the same denomination, reflect the prevailing confusion regarding the meaning and proper application of this Court's instructions in *Jones*.

Commentators have observed the serious consequences that this confusion and inconsistency may reap. As Judge Adams has noted:

> "State courts willing to inject their own preferences regarding church polity often will be able, in the absence of an express provision regarding church property, to adopt the presumption reflecting their own predilections. Furthermore, the Court's opinion appears to dash any hope that may have existed for a definitive and uniform rule of decision. National and local churches alike continue to face the prospect of conflicting results depending upon the state of adjudication.
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> "The most serious consequence of the Court's opinion lies, however, not in its effects upon state law but, as the dissent suggests, in the fact that 'important issues of federal constitutional law thus are left to the state courts for their decision.' For churches, no less than individuals, may 'stake out some very elementary and basic claims to freedom under the First Amendment.' By failing to address the first amendment implications of the doctrine of implied consent, the Court in *Jones v. Wolf* left the state courts to trace a constitutional course at least poorly mapped, if not, as the dissent claims, 'totally uncharted.' "[27]

In noting the treacherous course left for state courts to maneuver, Judge Adams recounted Justice Powell's criti-

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[27] Adams and Hanlon, *supra* note 7, 128 U.Pa.L.Rev. at 1335 (*quoting Jones v. Wolf*, 443 U.S. at 616 (Powell, J., dissenting)). *See also* Note, *Judicial Resolution of Intrachurch Disputes*, 83 Colum.L.Rev. 2007, 2028-29 (1983); Note, *supra* note 14, 68 Geo.L.J. at 1163.

cism in *Jones* of the neutral principles analysis, where he too observed that the majority's opinion gave inadequate guidance to state courts regarding the constitutional limits of permissible evidentiary inquiry in church property cases.

> "[T]he Court affords no guidance as to the constitutional limitations on such an evidentiary rule; the state courts, it says, are free to adopt any rule that is constitutional. * * * In essence, the Court's instructions on remand therefore allow the state courts the choice of following the long-settled rule of Watson v. Jones or of adopting some other rule—unspecified by the Court—that the state courts view as consistent with the First Amendment. Not only questions of state law but also important issues of constitutional law are thus left to the state courts for their decision, and if they depart from Watson v. Jones, they will travel a course left totally uncharted by this Court." 443 U.S. at 616.

While we agree with Justice Powell that, in the prevailing uncertainty surrounding the neutral principles approach of *Jones*, issues of constitutional moment are presently subject to an unacceptable degree of variation, if not manipulation, from state to state, we do not concur in his view that the neutral principles analysis should be abandoned in favor of the deference approach of *Watson v. Jones*. Instead, we believe that the neutral principles analysis is the constitutionally appropriate method for resolving church property disputes, so long as the extent of inquiry under the analysis is restricted to an examination of evidence that *clearly and directly* reflects how the parties intended to treat local church property *in the event of the withdrawal or disaffiliation of a local church.*[28] Al-

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[28] *See Jones v. Wolf*, 244 Ga. at 389, 260 S.E.2d at 85 ("The church documents in the present case speak to resolution of doctrinal disputes.

though we think that the majority in *Jones* intended to craft such a restrictive rule of evidence, and did not intend that a trust over local church property could be predicated on a denomination's general control over its local units, even as to certain matters involving property,[29] the disparate lower court decisions issued since *Jones* reflect that there is great uncertainty as to how the majority intended the neutral principles approach to be applied. The instant case poses the issue clearly, and affords this Court with the opportunity to provide to state courts sorely needed guidance regarding the neutral principles analysis.

They are silent as to which persons have the right to enjoy and use the church property in the event of a schism at the local level.")

[29] If it were otherwise, courts would almost always have to conclude, in cases involving churches of hierarchical polity, that local church property has been held in trust for the general church. For, in hierarchical denominations, there will always be numerous canons, constitutional provisions and by-laws that provide for substantial control by the general church over the affairs of the local unit, including some which are ecclesiastic in nature and some which are not. Yet, the fact that a local unit agrees to submit to substantial control over its affairs by the denomination while it is affiliated with the general church—not only in ecclesiastic matters but also as to matters of finance and even property—does not mean that parties struck any agreement regarding what would happen to local church property if the local unit were to withdraw from the denomination as the result of a schism.

CONCLUSION

The importance of insulating church property decisions from ecclesiastic considerations cannot be overstated. The real property of a local church is significant to its members not merely because of its economic value, which may be substantial, but because it both provides a place for the congregation to assemble to worship together and stands as a symbol of the spiritual bond that has joined them in the pursuit of their common religious beliefs. When a local church decides to withdraw from the denomination with which it has been affiliated, the threat that it may be dispossessed of its property acts as a forceful inhibition on the local congregation's collective will to implement that decision. Given that church property disputes nearly always arise from disagreements over matters of doctrine, as was the case here, there is ever present the risk that the general church will, by attempting to seize the local church's property in the absence of a clearly expressed prior agreement of trust or reversion, seek to coerce the local church into religious conformity, to stifle religious dissent, and thereby to inhibit the local church's exercise of its freedom to associate with, or disaffiliate from, the denomination of its choice. Simply stated, the First Amendment cannot tolerate a denomination's use of church property, church property lawsuits or the civil courts as vehicles for enforcing ecclesiastic doctrine or for disciplining a local church for its nonconforming views. Yet, that result will be promoted if the decision below is allowed to stand.

For these reasons, and those addressed above, we respectfully urge the Court to grant a writ of certiorari, and to reverse the decision below.

Respectfully submitted,

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Of Counsel

Dated: June 24, 1986

APPENDIX

APPENDIX A
IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER STATE OF COLORADO

Civil Action No. C-75959, Division 8

THE BISHOP AND DIOCESE OF COLORADO, a Colorado non-profit corporation; THE REVEREND CHARLES LARRY DAY, ALLEN UYEDA, ROBERT DOUGLASS, H. DAVID HUSKIN, HARRY THOM, JOHN BROWN, JOSEPH ESCH, CARLA PARNELL, MILDRED MULLENAX, JOHN HELMORE, OTIS DRURY, MARIAN LATTIMORE, as members of the Vestry of the Episcopal Parish of St. Mary's; the EPISCOPAL PARISH OF ST. MARY'S; and EPISCOPAL CHURCH OF ST. MARY,

Plaintiffs,

v.

THE REVEREND JAMES O. MOTE, JOHN ARCHIBOLD, MARVIN OLSEN, JOHN BRAINERD, WAYNE GILL, CHRIS WOODBURY, RICHARD ATCHISON, CHARLES BUELL, RICK HILL, WALTER KULP, JAMES LUCERO, LORNE SCOFIELD, and SAINT MARY'S CHURCH, a Colorado non-profit corporation,

Defendants.

Filed
JAN 21, 1980

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

THIS MATTER was tried to the Court, commencing on November 26, 1979 and concluding on November 29, 1979. Plaintiffs had previously submitted a Trial Memorandum, and defendants had submitted a Memorandum of Authorities. The parties had also filed a comprehensive Joint Trial Data Certificate, which was approved by the Court at the pre-trial conference on October 26, 1979. Plaintiffs were represented by Miles M. Gersh, of Fishman,

Gengler & Geman, P.C., and by Field C. Benton, of Holland & Hart. Defendants appeared by their counsel Forrest C. O'Dell, of Skelton, Oviatt & O'Dell.

The lawsuit arises out of a dispute between two factions within St. Mary's Church, an Episcopal church, or parish, which was established in Denver in about 1931. St. Mary's was incorporated in 1934, and title to its real property is held in the name of its corporate entity, defendant Saint Mary's Church, a Colorado non-profit corporation.* Each of the disputing factions has contended that its respective governing board, or "vestry," is entitled in that capacity to the possession and control of all real and personal property held by St. Mary's Church on November 28, 1976, when a majority of its then members voted to withdraw from the Episcopal Church. The individually named plaintiffs are the vestry or governing board of the group which voted to remain within the Episcopal Church. The individually named defendants are the governing board of the faction which withdrew from the Episcopal Church, including the then rector of St. Mary's Church, the Reverend James O. Mote. The Court has determined this matter in favor of the individually named plaintiffs in their official capacity. The Court's findings and conclusions are set forth below.

At the outset, the Court acknowledges, and emphasizes, its Constitutional obligation to decide this case without ruling upon disputed questions of faith or doctrine, and without interfering with the resolution of issues of religious doctrine or polity by authoritative church tribunals.

Having reviewed both the oral and documentary evidence introduced at the trial, the facts stipulated to by

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* The name St. Mary's appears in several different forms in the local church's corporate documents—"St. Mary's," "St. Marys," "Saint Mary's." These particular differences have not been treated as legally significant by the parties or the Court.

the parties, and the arguments of counsel, and being thus fully advised in the case, the Court now finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff The Bishop and Diocese of Colorado, a Colorado non-profit corporation, is the corporate entity of the Episcopal Diocese of Colorado, (hereafter, "the Diocese" or "the Diocese of Colorado"). Founded in 1871, the Diocese of Colorado is one of the subordinate geographical units of the Protestant Episcopal Church in the United States of America (known generally and referred to herein as "the Episcopal Church" or "PECUSA," also as the "national" or "parent" church). Initially incorporated in Colorado in 1880 under the name of The Bishop and Chapter of the Cathedral of St. John the Evangelist, the Diocese changed its corporate name in about 1923 to The Bishop and Diocese of Colorado. The Diocese is presided over by a Bishop, who is both its chief ecclesiastical authority and the chief executive officer of its corporate entity. The Diocese has a legislative and policy making body called the Annual Convention and an executive body, called the Diocesan Executive Council, with responsibility to carry out the policies and programs of the Annual Convention, and with broad responsibility over financial and property matters in the Diocese.

2. Plaintiff The Reverend Charles Larry Day is the duly appointed parish priest, or rector, of plaintiff Episcopal Church of St. Mary. Plaintiff Episcopal Church of St. Mary is a Colorado non-profit corporation which was formed in 1977 by the members of St. Mary's Church who had voted on November 28, 1976 to remain within the Diocese of Colorado and the Episcopal Church.

3. The other individually named plaintiffs are the members of the vestry or governing board of Episcopal Church of St. Mary, and are thus the governing board of those

individuals who voted in November of 1976 to remain in the Episcopal Church.

4. Defendant James O. Mote is a former priest of the Episcopal Church, is the former Episcopal rector of St. Mary's Church, and is presently the pastor of the group which seceded on November 28, 1976, and which then took possession and control of the real and personal property of St. Mary's. Mote is also a Bishop of the Anglican Catholic Church, an entity which he and others formed in 1977, after the division at St. Mary's.

5. The other individually named defendants are the governing board elected by those who voted to withdraw from the Episcopal Church on November 28, 1976 or else by their successors, and who have claimed the right to control the real and personal property of St. Mary's Church.

6. Except where the context indicates otherwise, the terms "St. Mary's Church" or "St. Mary's" as used in these findings and conclusions mean both the religious entity organized and functioning as a part of the Diocese of Colorado, as well as the corporate entity adopted by the church members under Colorado law, as these existed from the early 1930's to November 28, 1976.

7. It is undisputed in this case that the rectors and successive governing boards of St. Mary's Church acknowledged their status as a local unit within the Episcopal Church and accepted the benefits of that affiliation for more than 40 years. Plaintiffs' evidence at trial included proof of many concrete details in the development of this historical relationship between St. Mary's and the higher bodies of the Episcopal Church. Since this factual background was important to the Court's findings and conclusions regarding the hierarchical nature of the Episcopal Church and the subordinate role of St. Mary's within that structure, highlights of that historical background are summarized below.

8. St. Mary's Church was incorporated under the laws of the State of Colorado in 1934. The incorporators specified in their Affidavit of Incorporation that it had been "unanimously decided to organize as a Protestant Episcopal Church under the Diocese of Colorado, with the corporate name of Saint Marys Church." The original board of directors included the first spiritual leader of St. Mary's, the Reverend G. A. C. Lehman, a priest of the Episcopal Church, who had been educated at an Episcopal seminary.

9. St. Mary's had been in existence from about 1931 or 1932 as a mission within the Diocese of Colorado. Missions, which are organized groups consisting usually of a relatively small number of Episcopal Church members, are eligible to participate in the affairs of the Diocese, specifically in the deliberations of its legislative and policy making body, the Annual Convention.

10. From the founding of St. Mary's, Father Lehman and the members of his small congregation assumed an active role in Diocesan affairs. From 1932 to 1934, for example, Lehman accepted election to membership on the Standing Committee of the Diocese, one of the important Diocesan tribunals. During 1943 to 1945 Lehman acted as the Diocese's official historiographer, and from 1939 to 1950, Lehman was a member of the Court of Appeals of the Diocese. Father Lehman's successor as rector, the Reverend James O. Mote, accepted election or appointment to several Diocesan committees, and on two occasions served as a delegate to regional bodies under PECUSA, the parent church organization. Both St. Mary's clergy and lay persons regularly received and accepted official appointments within the Diocese and the Episcopal Church from the early 1930's up to and including 1976, the year of the dispute which resulted in the present lawsuit. In that year, too, St. Mary's sent a delegate to the parent church's General Convention.

11. In 1936, the official Diocesan journals recognized St. Mary's as an organized mission of the Diocese, and by 1939 St. Mary's had begun sending delegates to the Annual Diocesan Convention. The evidence showed that St. Mary's sent delegates to all but three of the Diocese's Annual Conventions over the next 37 years, up to and including 1976, when 7 lay delegates and defendant Mote represented St. Mary's at the Annual Convention.

12. Diocesan activities are funded by means of payments from the missions and parishes in the Diocese. The payments were mandatory from the time when St. Mary's was established until 1973, when they were made voluntary. Records maintained by the Diocese during the period of mandatory assessments showed that in every year from 1932 through 1972, St. Mary's paid the full amount of its yearly assessment.

13. Until they are granted formal parish status, missions are eligible to receive direct financial assistance from the Diocese. Beginning in 1932, the Diocese made disbursements to St. Mary's Mission, either to the Mission directly or in the form of salary support to the priest in charge. These disbursements to St. Mary's continued in every year from 1932 through 1954, when St. Mary's sought and obtained from the Diocese formal recognition as a parish.

14. In seeking in 1954 to be recognized as a parish, St. Mary's unanimously adopted a resolution acceding to the Constitutions of the national church and the Diocese, recognizing the authority of the General Convention of the national church, promising obedience to the national church's Canons and to the Canons of the Diocese, and promising conformity to the doctrine, discipline and worship of the Episcopal Church in the event that it would be granted parish status. St. Mary's was granted parish status by the Diocese in 1954.

15. In 1955, the year after it became a parish, St. Mary's requested and received the required consent of the

Diocese to revise completely its own Articles of Incorporation. The revised Articles, which reflect the Diocesan approval, contain specific provisions acceding to the laws of the Diocese and of the Episcopal Church. The amended Articles state, among other things, that "the objects and purposes for which said parish is incorporated are to administer the temporalities [i.e. the properties and revenues] of the Protestant Episcopal Church in the parish"; that "the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado, a corporation, expressed by resolution of its Board of Trustees"; and that "the corporation does hereby expressly accede to all of the provisions of the Constitution and Canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all the provisions of the Constitution and Canons of the Diocese of Colorado." The evidence indicated that from the time of their adoption in 1955, to 1976, these quoted provisions of St. Mary's articles were not removed or altered.

16. In the same year, 1955, St. Mary's adopted corporate by-laws. Article II, captioned "Accession," provided that St. Mary's acceded to the Constitution and Canons of the Diocese and the Episcopal Church, and that "the parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan." The evidence showed that on various occasions after 1955, the governing board of St. Mary's re-examined these by-laws and made certain changes; however, there was no change in the accession provision from 1955 until 1976.

17. In 1956, the then Father James O. Mote, who had been acting as an assistant to Father Lehman at St. Mary's Church, was nominated by St. Mary's to the Bishop of Colorado to be rector of St. Mary's Church. The nomination was carried out pursuant to provisions of the laws of the PECUSA and of the Diocese of Colorado. Mote had

been ordained in the Episcopal Church in 1952, after having attended an Episcopal seminary. In connection with his ordination, Mote signed an oath of conformity, required to be taken by all Episcopal priests at the time of their ordination. In that oath, Mote vowed to "conform to the doctrine, discipline and worship of the Protestant Episcopal Church in the United States of America."

18. When the parish burdened its real property in connection with construction loans or purchases of other property, it submitted formal applications for consent to encumber to the Board of Trustees of the Diocese or to the Board's successor entity, the Diocesan Executive Council, the tribunal having general charge of property and financial matters. Thus in 1956, St. Mary's sought and obtained authorization from the Board of Trustees for a loan to construct clergy quarters. In 1963, request was made to encumber St. Mary's property in connection with a major improvement project. Requests for permission to encumber in connection with purchases of private residences were made in 1973 and in 1976, the year of the secession. In one year, 1968, an encumbrance may have been incurred without requesting consent, but this was apparently not done with any intent to defy or disobey the Diocese.

19. St. Mary's Church used the Book of Common Prayer in its services, as prescribed by the Episcopal Church, and used also the proposed revisions in that Book, called "trial liturgies," as directed by the Diocese.

20. Beginning in the early 1970's, doctrinal controversy occurred within the Episcopal Church in several areas, including changes in the Book of Common Prayer, the authority of bishops to terminate marriage, the propriety of the ordination of women to the priesthood, and other matters. St. Mary's continued during this time to send delegations to the Diocesan Conventions, where St. Mary's expressed its views by introducing formal resolutions. At

the 1974 Annual Convention, St. Mary's introduced a resolution which urged the Convention to reaffirm its adherence to the Constitution and Canons of the Episcopal Church.

21. In September of 1976 the General Convention of the Episcopal Church formally approved the ordination of women to the priesthood. The Annual Convention of the Diocese of Colorado was held two months later, in November of 1976. Because of their dissatisfaction with some of the actions taken by the General Convention, the St. Mary's delegation presented a resolution calling upon the Diocese to withdraw from the Episcopal Church. When the Convention rejected this resolution, the then Father Mote made an announcement to the effect that he could no longer be a member of the Episcopal Church, and walked out of the Convention, along with most of the members of the St. Mary's delegation.

22. A day or two after the Diocesan Convention, the Rt. Rev. William C. Frey, Bishop of the Diocese of Colorado, met with Mote, and advised Mote that his declarations and actions at the Convention, unless retracted, would require that he be removed from the ministry of the Episcopal Church.

23. On two occasions during the next three weeks, Bishop Frey dispatched formal pastoral letters to all of the members of St. Mary's Church, including Mote, restating that Mote's public declarations, unless retracted, would necessarily lead to his removal, or "deposition," from the Episcopal ministry. The second letter stated the position of the Bishop, as Eccelsiastical Authority and Chief Executive Officer of the Diocese, that he and his legal adviser would reject any effort to amend the St. Mary's Articles of Incorporation by deleting references to the subordination of St. Mary's Church to the authority of the Episcopal Church. The Bishop stated that, "It is, of course, impossible to prohibit individuals from leaving the Church.

A parish is another matter, however, and secession can not be accomplished without deliberate involvement in a unilateral abrogation of mutually accepted covenants. In other words, individuals who feel so compelled may leave the Church, but St. Mary's will continue as a congregation of the Episcopal Church in this Diocese. . ."

24. On November 28, 1976, at a meeting at St. Mary's Church the dissident faction voted to change the Articles of Incorporation of St. Mary's by deleting all of the provisions recognizing the authority of the Diocese and the Episcopal Church. Bishop Frey tried to attend this meeting, but was physically barred at St. Mary's by members of the dissident group. Thereafter, the defendants and other dissident members changed the locks on the doors of the church and posted off-duty Denver policemen as guards at the doors.

25. The next day, November 29, 1976, Bishop Frey sent a "letter of inhibition" to the then Father Mote, prohibiting him from performing any priestly functions for at least 6 months, and notifying him that he would be removed from the ministry at the end of that time if he did not retract his withdrawal from the Episcopal Church. In the same communication, the Bishop directed Mote to vacate the premises of the church buildings at 2290 South Clayton Street within 30 days and to accord all courtesy to the temporary vicar, or spiritual leader, to be appointed to the parish by the Bishop.

26. At about this same time, Bishop Frey met with the members of St. Mary's who had voted not to withdraw from the Diocese, for the purpose of recognizing them, and not the dissident group, as constituting St. Mary's Church. These individuals, sometimes referred to by the parties as the "loyal group," have since been meeting in quarters rented from another Denver church.

27. On December 4, 1976, the loyal group held a meeting and elected temporary replacements to fill the places of

those fromer [sic] vertry [sic] members who had withdrawn from the Episcopal Church. At the next annual meeting of the loyal group, in January of 1977, permanent replacements were elected. They, or in some cases their duly elected successors, are the individually named plaintiffs in this case.

28. On December 14, 1976, the Diocese of Colorado, speaking through the Diocesan Executive Council, adopted a resolution declaring that the Diocese "does not approve or recognize the action taken by St. Mary's Church to withdraw from the Diocese of Colorado, supports those members of St. Mary's Church who voted against such withdrawal and affirms its ecclesiastical ties and its rights with respect to the non-profit corporation known as St. Mary's Church." The Executive Council also made the following report to the 1977 Annual Diocesan Convention, which the parties have stipulated constitutes the official record of the formal action of the Executive Council: "Upon the vote of a majority of St. Mary's Church to secede from the Diocese, the Council formally recognized the remaining 79 loyal communicants as St. Mary's Church, Denver. Council, acting as the Board of Trustees of the Diocese, as well as in its own right denied consent to the secessionists acts of the majority of St. Mary's members, refusing to recognize changes in St. Mary's Articles of Incorporation."

29. At the end of the 30 day period which had been prescribed in Bishop Frey's letter of inhibition, the then Father Mote had not vacated the premises of St. Mary's Church. Bishop Frey testified, however, that in order to avoid a physical confrontation and with the hope that the dispute could be resolved, he refrained from sending a temporary vicar to St. Mary's.

30. In 1977, defendant Mote and others who had withdrawn from the Episcopal Church formed a new religious organization called the Anglican Catholic Church. Mote was

appointed a Bishop of that church organization and purported to affiliate St. Mary's with it.

31. In June of 1977, Bishop Mote was removed from the ministry of the Episcopal Church by action of the Bishop and the Standing Committee of the Diocese of Colorado.

32. The loyal St. Mary's group has since sent representatives to the Annual Conventions of the Diocese of Colorado in 1977, 1978 and 1979, where these delegations have been recognized and have been seated as the delegation of St. Mary's Church, Denver, the same entity which had been recognized at Diocesan Conventions prior to 1976.

33. Defendants and others who withdrew from the Episcopal Church made no objection to any of these actions by the Executive Council, the Bishop, or the Convention and made no attempt to appeal them, at least not within the Episcopal Church. There was evidence, however, that on March 14, 1978, an attorney representing the faction which had seceded from the Episcopal Church requested and was granted an opportunity to address the Diocesan Executive Council to seek to persuade the Council not to take an active role in litigation to recover the St. Mary's Church property. This attorney addressed the Executive Council and presented certain documents which were admitted as exhibits for the limited purpose of showing defendants' opportunity to present their position to the Executive Council. No objection was made at that time to the actions taken recognizing the loyal group as constituting St. Mary's Church.

34. Notwithstanding the above described formal actions by the Diocese of Colorado recognizing the members of St. Mary's Church who have remained within the Episcopal Church as constituting St. Mary's Church, and denying consent to the acts of the secessionist majority, defendants and others who have withdrawn from the Episcopal Church have continued to refuse to surrender possession or control

over any of the property of St. Mary's Church either to the Diocese of Colorado or to the governing board of the St. Mary's members who have remained within the Episcopal Church.

35. Based on all of the evidence, the Court finds that the Episcopal Church is organized and functions as a "hierarchical" church, as that term was used and defined by the United States Supreme Court in *Watson v. Jones*, 80 U.S. 679 (1871); that the Episcopal Church's hierarchical organization or polity extends to both religious and temporal matters, including matters of property; that St. Mary's Church has always been an integral and subordinate part of that hierarchical structure; and that the Executive Council of the Diocese of Colorado, as well as all other authoritative, decision-making officers and tribunals within the Diocese of Colorado which addressed the matter, have determined that the group which comprises St. Mary's Church is the group which has remained within the Diocese of Colorado and the Episcopal Church, and not the group which has seceded from those bodies. Having been recognized by the appropriate governing bodies of this hierarchical church organization as the representative and successor to the local church as it existed prior to the division, the loyal group by its governing board or vestry, is entitled to be restored to possession and control of the real and personal property of St. Mary's Church.

36. In order to arrive at these conclusions, the Court has not found it necessary to decide internal ecclesiastical disputes over church doctrine, discipline or government. Indeed, as mandated by the United States Supreme Court, the Court has found it necessary *not* to decide any such disputed matters. *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Maryland and Virginia Eldership v. Sharpsburg Church*, 396 U.S. 367 (1970); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, ___ U.S. ___, 99 S.Ct. 3020 (1979). *Cf. Bernson v. Koch*, 35 Colo. App. 257, 534 P. 2d. 334 (1975).

37. The approach of *Watson v. Jones,* sometimes called the polity approach, is the most appropriate means of resolving this particular dispute under all of the circumstances of this case. Merely to identify the formal title holder would not be a reasonable or apt approach to this dispute because, of course, the critical issue has never been whether "St. Mary's Church" as opposed to some other entity has title to the property. Rather, the dispute has been *within* that church, and the key issue has always been which of the two contending factions properly constitutes St. Mary's Church. Nor would it be appropriate to decide this case simply by counting votes within the local church, such as by looking to the November 28, 1976 vote on the question of amending the articles of St. Mary's Church. No searching inquiry into the structure or operation of the Episcopal Church or the Diocese of Colorado is required to determine or demonstrate that both in this denomination and in this particular local church questions such as those involved in this case are not to be resolved by such a "congregational" method. The corporate by-laws of St. Mary's provide, for example, that *nothing* is to be done by the *corporation* which conflicts with the laws of the Diocese. It is undisputed in this case that in the Diocese of Colorado the corporate articles of a parish can only be amended with consent of the Bishop and his legal advisor. Alienation, encumbrance and use of the property of an incorporated parish are not committed to the independent control of the parish. The facts in this case are quite similar to those involved in the *Watson* case, where within a hierarchical church, the United States Supreme Court accepted and enforced the findings of the highest church authorities to have addressed a question of identity analogous to the one before this Court. Since this is the method which the Court applies in this case, the Court need not and does not address plaintiffs' alternative theories of implied trust and breach of contract.

38. Under all of the circumstances of this particular case, moreover, for this Court to give effect to the decisions taken by the highest tribunals within the Episcopal Church which have adressed this matter of identity is not only appropriate but necessary. This is because, although the question of the identity of the proper representatives of St. Mary's Church, Denver, obviously affected ownership of the church property and was so regarded by the Episcopal Church authorities, it also directly involved, as the Bishop of the Diocese of Colorado testified, matters of Episcopal Church polity. The evidence showed that the Executive Council of the Diocese of Colorado and the Bishop of Colorado considered the issues in the St. Mary's controversy to be fundamental to the integrity of the polity of the Episcopal Church. (Testimony of Bishop Frey and Father Royster). The First Amendment requires that civil courts give effect to the resolution of such issues within the authoritative tribunals of a hierarchical church organization. As the United States Supreme Court, citing *Watson v. Jones* and other cases, has most recently declared, "Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. [Citations omitted.] As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v. Wolf*, ___ U.S. ___, 99 S.Ct. 3020, at 3025 (1979).

39. The finding that the Episcopal Church is a hierarchical church within the meaning of *Watson v. Jones* requires no resolution by this Court of any doctrinal matters. *First*, the *Watson* case itself cites the Episcopal Church as a specific example of a hierarchical as opposed to a congregational church. 80 U.S. 679, at 729. Also in *Protestant Episcopal Church v. Graves*, 391 A.2d 563 (N.J. Super. 1978), *aff'd per curiam*, 401 A.2d. 548 (N.J.App.Div. 1979), the court held: "The test of *Watson* quoted by Jus-

tice Brennan in *Sharpsburg,* that a religious organization be but a subordinate part of a general church organization in which there are superior ecclesiastical tribunals with a more or less complete power of control, is plainly met here. The Court therefore finds that the Protestant Episcopal Church is hierarchically structured as a matter of law." 701 A.2d 548, at 575.

40. *Second,* plaintiffs' expert witness Father Robert Royster, described, based on his extensive experience in positions of responsibility within both the national church and the Diocese, the actual operation of the national church and its exercise of power over the subordinate units therein, including the dioceses, missions and parishes. Two charts, showing the hierarchical structure of the parent church and the Diocese were described by Father Royster and were admitted without objection. The testimony and evidence showed that the General Convention of the Episcopal Church, which meets once every three years, is comprised of lay and clerical delegates from each of the dioceses. Actions of the General Convention are in the form of resolutions, which are either statements of policy or are amendments to the national Constitution and Canons. Only the General Convention has the power to amend the national Constitution and Canons, which provide rules for both the temporal and spiritual life of the Episcopal Church and are binding on all dioceses, parishes and missions. Within the Diocese of Colorado there is also a hierarchical structure, whose highest legislative and policy making tribunal is the Annual Diocesan Convention. Father Royster's conclusion that the Episcopal Church and the Diocese of Colorado are hierarchically structured and controlled was based on the facts of the actual operation and government of these bodies, of which this witness had had firsthand experience. Giving due weight to this expert's conclusions, therefore, did not require this Court to interpret or resolve any doctrinal matters.

41. *Third,* while St. Mary's, like other incorporated parishes in the Diocese of Colorado, held formal title to its own property, as a condition of achieving parish status, St. Mary's, also like other parishes, adopted and agreed to be bound by the Constitution and Canons of the Episcopal Church and of the Diocese. It is undisputed that these documents contain provisions which affect the right of ownership and use of church property—including provisions that no parish shall incur indebtedness which may alienate or encumber church property without the written consent of the Diocesan Executive Council; that no parish may file Articles of Incorporation as required by the State of Colorado unless such Articles are in accord with and accede expressly both to the Constitution and to the Canons adopted by the General Convention of the Episcopal Church and also to the Constitution and Canons of the Diocese; that no parish may amend its Articles of Incorporation without the written consent of the Bishop and the Chancellor or Vice-Chancellor of the Diocese; and that church buildings belonging to any parish within the Diocese may be opened for purposes authorized by the Episcopal Church or by the Bishop and for no other purposes. No dispute has arisen in this case as to the meaning of these provisions; nor would the Court in any event resolve any such dispute. But the uncontradicted fact that these provisions are part of the laws to which St. Mary's was required to accede and did accede provides additional confirmation of the hierarchical nature of the Episcopal Church and the subordinate role of St. Mary's therein.

42. *Fourth,* the Bishop of the Diocese of Colorado, Bishop Frey, described and gave concrete examples of many respects in which he and other Diocesan authorities and tribunals actually exercise authority and power over parishes and missions, including specifically St. Mary's Church. Included were examples of the exercise of the obviously important powers of approving or disapproving alienation, encumbrance and use of all church buildings

belonging to parishes. The Bishop has authority to visit congregations in the Diocese for the purpose of inspecting the behavior of their clergy and of examining their general physical and financial condition. Only the Bishop may ordain deacons and priests. The Bishop also has authority to discipline priests, and to remove them from priestly office under certain circumstances. The Bishop has a veto power over appointment of parish priests. Only the Bishop has the basic power to confer communicant status, the fundamental prerequisite for official membership in the Episcopal Church. No evidence was offered by defendants to contradict Bishop Frey's description of the actual operation and exercise of authority within the Diocese, either as to spiritual matters or as to property and financial matters. Defendants' expert witness, for example, offered no testimony at all on this important point.

43. The Court finds also that St. Mary's Church operated and functioned consistently as a subordinate part of the hierarchical polity of the Diocese and the Episcopal Church. In making this finding, again, the Court resolves no ecclesiastical disputes nor does it interpret any church doctrines or laws. The Court relies, rather, upon the detailed and largely undisputed facts of the history of the role played by St. Mary's Church and its members in the Diocese from the time of the founding of St. Mary's as a mission in the early 1930's until the time of the dispute which gave rise to this litigation. Many of these facts are set forth above, and they show that for 45 years St. Mary's Church acted as an integral part of the Episcopal Church hierarchy, promised obedience and conformity to that hierarchy, and carried out its promises.

44. Finally, formal recognition of the St. Mary's Church members who [had] remained within the Diocese of Colorado as constituting "St. Mary's Church" was granted by *all* of the authorities within the Diocese which addressed this

matter, i.e. by the Diocesan Executive Council, by the Bishop and by the Annual Convention. That the Bishop is the principal ecclesiastical authority in the Diocese and also has ultimate responsibility to approve the proper use of church buildings was not disputed by the defendants in this case. Neither was there evidence to controvert the evidence of the plaintiffs that the Diocesan Executive Council possesses and has exercised a broad responsibility to act in financial and property matters and to carry out the policies and programs of the Annual Convention. That the Annual Convention may and does determine the authority of delegates to represent particular parishes was also not disputed. Therefore, this was not a case where the Court was required to decide ecclesiastical questions in order to determine whether an appropriate church tribunal had addressed the disputed matter. Here, all of the hierarchical authorities which addressed the crucial question of identity recognized the loyal members as constituting St. Mary's Church. In giving effect to those findings, the Court makes no determination of doctrinal or ecclesiastical matters. The Court rather resolves a dispute over identity, which in turn resolves a dispute as to the ownership and control of church property.

JUDGMENT AND DECREE

1. The Court finds and decrees that the purported amendments to the Articles of Incorporation of St. Mary's Church adopted on November 28, 1976 were ineffective, and that the 1955 Articles of Incorporation of St. Mary's Church, remain in force and effect.

2. The Court finds and decrees that all real and personal property to which St. Mary's Church, a Colorado non-profit corporation, held legal or equitable title as of November 28, 1976 is rightfully under the dominion and control of the individual plaintiffs in this case, in their capacity as rector and members of the vestry of that church. The individual defendants and the other former members of

St. Mary's who have elected to withdraw from the Diocese of Colorado and from the Episcopal Church, have no interest of any kind in the real and personal property to which St. Mary's Church held legal or equitable title as of November 28, 1976.

3. The individual plaintiffs herein are entitled in their capacity as members of the vestry or governing board of St. Mary's Church to possession and control of all real and personal property to which St. Mary's Church held all legal or equitable title as of November 28, 1976.

4. The individual defendants herein are directed, within 30 days of the date of this decree, to surrender control of all real and personal property to which St. Mary's Church held legal or equitable title as of November 28, 1976 to the individual plaintiffs herein in their capacity as above described.

5. The individual defendants in their capacity as the vestry or governing board of the members of St. Mary's Church who have withdrawn from the Diocese of Colorado and from the Episcopal Church are hereby permanently enjoined from encumbering, selling, transferring, exchanging, spending, wasting or otherwise disposing of or dissipating any of the real or personal property to which St. Mary's Church held legal or equitable title as of November 28, 1976; and from using any of the real or personal property to which St. Mary's Church held legal or equitable title as of November 28, 1976 for any purpose without the express written consent and approval of the Bishop of the Diocese of Colorado.

6. The individual defendants in their above described capacity are directed to render an inventory and accounting to plaintiffs, on or before January 28, 1980, of all real or personal property of St. Mary's Church which defendants have in any way conveyed, transferred, sold, expended or exchanged from and after November 28, 1976; after that accounting has been rendered, the Court will

enter such further orders as may be appropriate respecting damages.

7. On defendants' Counterclaim in this action, the Court finds in favor of plaintiffs, and defendants' Counterclaim is hereby dismissed with prejudice.

8. Plaintiffs shall recover their costs of suit herein incurred.

BY THE COURT:

/s/John Brooks, Jr.
John Brooks, Jr.
District Judge
Denver District Court

January 21, 1980
Date

APPROVED AS TO FORM:

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APPENDIX B

COLORADO COURT OF APPEALS

No. 80CA0406

THE BISHOP AND DIOCESE OF COLORADO, A Colorado non-profit corporation, THE REVEREND CHARLES LARRY DAY, ALLEN UYEDA, ROBERT DOUGLASS, H. DAVID HUSKIN, HARRY THOM, JOHN BROWN, JOSEPH ESCH, CARLA PARNELL, MILDRED MULLENAX, JOHN HELMORE, OTIS DRURY, MARIAN LATTIMORE, as members of the Vestry of the Episcopal Parish of St. Mary's, the EPISCOPAL PARISH OF ST. MARY'S, and EPISCOPAL CHURCH OF ST. MARY,

Plaintiffs-Appellees,

v.

THE REVEREND JAMES O. MOTE, JOHN ARCHIBOLD, MARVIN OLSEN, JOHN BRAINERD, WAYNE GILL, CHRIS WOODBURY, RICHARD ATCHISON, CHARLES BUELL, RICK HILL, WALTER KULP, JAMES LUCERO, LORNE SCOFIELD, and SAINT MARY'S CHURCH, a Colorado non-profit corporation,

Defendants-Appellants.

Appeal from the District Court of the
City and County of Denver

Honorable John Brooks, Jr., Judge

DIVISION III
Opinion by JUDGE BERMAN
Kirshbaum and Tursi, JJ., concur

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

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Defendant-Appellant Pro Se

This is an appeal from a judgment granting legal title to St. Mary's Church to the minority of its members upon a split of the parish. We reverse.

St. Mary's Church was established as a mission within the Protestant Episcopal Church of the United States of America (Episcopal Church) in the early 1930's, and was incorporated under the laws of the State of Colorado in 1934. Twenty years later the mission of St. Mary's sought and obtained parish status from the Colorado Diocese of the Episcopal Church. As a condition of the parish status, St. Mary's unanimously adopted a resolution acceding to the constitutions of the national church and the Diocese, and promising obedience to the national church's canons and to the canons of the Diocese. Its articles of incorporation were amended to reflect the same accession. St. Mary's also adopted corporate by-laws which, in an article captioned "accession," provided that "the parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan."

Beginning in the early 1970's, a number of doctrinal controversies arose within the Episcopal Church. Among these controversies was whether women should be ordained to the priesthood.

The General Convention of the Episcopal Church formally approved the ordination of women in 1976. Two

months later, at the Annual Convention of the Diocese of Colorado, the St. Mary's delegation presented a resolution calling upon the Diocese to withdraw from the Episcopal Church in protest to the ordination of women priests. When the convention rejected the resolution, Father Mote, the rector of St. Mary's, announced that he could no longer be a member of the Episcopal Church and walked out of the convention, along with most of the members of the St. Mary's delegation. Upon Mote's failure to retract his public declarations, he was removed by the Bishop from the ministry of the Episcopal Church.

The dissident majority, including Mote, voted to secede from the Episcopal Church. They amended the articles of incorporation to reflect the secession.

About the same time as the majority's secession, the Bishop met with the minority of St. Mary's members still loyal to the church. He formally recognized this minority as representing St. Mary's parish. These individuals have since been meeting in quarters rented from another Denver church, while the majority continues to occupy the original St. Mary's building. The Diocese of Colorado then adopted a resolution declaring that it "does not approve or recognize the action taken by St. Mary's Church to withdraw from the Diocese of Colorado, supports those members of St. Mary's Church who voted against such withdrawal and affirms its ecclesiastical ties and its rights with respect to the non-profit corporation known as St. Mary's Church."

Because the secessionist majority considered themselves possessed of the property of St. Mary's Church, the Bishop of the Colorado Diocese of the Episcopal Church, the Colorado Diocese, and the members of St. Mary's Church loyal to the Episcopal Church sued to recover possession of all real and personal property held by the majority. The trial court held that the minority was entitled to the property. It considered it necessary to defer to the decision of the

Diocese which recognized the minority faction as the "true" Saint Mary's Church because it found that the Episcopal Church was hierarchical as to both doctrinal and temporal matters. The trial court explained in its findings that deference was "necessary" because high church officials had testified that the ownership of local parish property was a matter of church "polity." In this regard the court stated: "The evidence showed that the Executive Council of the Diocese of Colorado and the Bishop of Colorado considered the issues in the St. Mary's controversy to be fundamental to the integrity of the polity of the Episcopal Church." Accordingly, it ordered the majority to surrender control of all real and personal property held in the name of St. Mary's Church, and the majority appeals.

The appellants argue that the trial court need not have deferred to the diocesan decision as to property ownership. They maintain that if a "neutral principles of law" approach is applied, they are entitled to possession. We agree.

Judicial review of the internal affairs of church organizations has long been a subject of intense debate. Whenever a court is called upon to settle church property disputes, the spectre of the First Amendment freedom of religion and establishment clauses is raised. For fear of excessive entanglement in church affairs, the courts have long struggled with where the line is to be drawn between disposing of the matter as a civil property dispute and deferring to church polity. This question has largely been settled by the case of *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979). However, for the sake of completeness, and because we believe that a short disposition on the history of the judicial debate may be helpful in our future application of *Jones*, we begin with an exegesis.

The seminal Supreme Court decision concerning judicial review of disputes over church property is *Watson v. Jones*, 80 U.S. (13 Wall) 679 (1871). In *Watson*, the Court divided

church property disputes into three categories. In the first category, if the local church property has been dedicated to the church subject to express conditions of trust, a court must enforce those conditions. Secondly, if the property is held by a congregational church, *i.e.*, one that is not subject to decisions from higher authority within a church hierarchy, then a majority of the church members may control the disposition of the property. In the third category, if the property is held by a local church under the control of a hierarchical organization, courts must defer to the appropriate church tribunal's resolution of any question of religious doctrine upon which the settlement of the church property dispute depends.

This third category has been variously labeled the "polity" or "compulsory deference" rule. It was applied to settle the dispute in *Watson* because the deed to the property as well as the charter of the local church "subjected both property and trustees alike to the operation [of the general church's] fundamental laws." *Watson* at 683.

Because the compulsory deference doctrine announced in *Watson* allows a hierarchical church almost unlimited power over its local churches, later decisions have imposed minimal fairness requirements on the management of local property by such churches *See, e.g., Gonzales v. Roman Catholic Archbishop of Manila,* 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929).

The "neutral principles" approach first appeared in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). *Presbyterian Church* presented a hierarchical church dispute between a general church and two of its local member churches over the right to use the local churches' property. The schism arose because the local churches claimed that the general church had violated the organization's constitution. At the time, Georgia law implied a trust of local property for the benefit of the

general church on the condition that the general church adhere to church doctrine as it existed at the time of affiliation of the local churches. Because the jury found that the general church had abandoned its original doctrines, the Georgia Supreme Court upheld the right of local congregations to withdraw and to maintain possession of the local property.

The Supreme Court held that such a civil court inquiry into whether the general church had departed from doctrine was improper because such questions are matters of purely ecclesiastical concern. The court remanded with instructions to avoid "resolving underlying controversies over religious doctrine." And, for the first time, the Supreme Court stated that "neutral principles of law, developed for use in all property disputes," should be applied by civil courts when faced with church property disputes. On remand, the Georgia Supreme Court concluded that, without the departure-from-doctrine element, the implied trust theory would have to be abandoned in its entirety. *Presbyterian Church v. Eastern Heights Church,* 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied,* 396 U.S. 1041, 90 S.Ct. 680, 24 L.Ed.2d 685 (1970).

The neutral principles rule was examined in *Maryland & Virginia Eldership v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970), and was then somewhat circumscribed by the decision in *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). However, neither of these cases gave concrete guidance as to the strict application of the rule, and this resulted in a number of divergent lower court decisions. *See, e.g., First Presbyterian Church v. United Presbyterian Church,* 430 F. Supp. 450 (N.D.N.Y. 1977); *Presbytery of the Covenant v. First Presbyterian Church,* 552 S.W.2d 865 (Tex. Civ. App. 1977); *Kelly v. Riverside Boulevard Independent Church of God,* 44 Ill. App. 3d 673, 358 N.E.2d 696 (1976); *Board*

of Church Extension v. Eads, 230 S.E.2d 911 (W. Va. 1976).

This ambiguity was dissipated in *Jones v. Wolf, supra.* By applying the *Jones* definition of neutral principles and comparing its facts to the facts of this case, we conclude that the trial court should not have deferred to the diocesan decision. Rather, the dispute should have been settled according to the *Jones* neutral principles approach.

Jones involved a dispute over control of the local church between two factions of a Presbyterian congregation. Just as in the case at bar, a majority of the local congregation had voted to withdraw from the general church and had retained control of the local church property. Representatives of the minority faction brought suit seeking declaratory and injunctive relief establishing their right to exclusive control of the local church's property as the faction loyal to the general church.

Applying the neutral principles rule the trial court ruled the majority was entitled to possession, and the Georgia Supreme Court affirmed. *Jones v. Wolf,* 241 Ga. 208, 243 S.E.2d 860 (1978). The United States Supreme Court agreed with Georgia's application of the neutral principles rule, but remanded for a more definite statement of the grounds for its decision. *Jones v. Wolf, supra.* On remand, the Georgia Supreme Court ruled that the presumption in favor of majority control is overcome only by statements contained in church documents pertaining directly to church property.[1] *Jones v. Wolf,* 244 Ga. 388, 260 S.E.2d 84 (1979),

[1] It stated: "Georgia has adopted for use in church local schism cases a 'presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means.' *Jones v. Wolf, supra,* at [607], 99 S.Ct. at 3027. That presumption is overcome under Georgia law by an application of what has come to be known as 'neutral principles' of law—that is, 'state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination' . . . [C]hurch documents will be considered only insofar as they determine or assist in the determination of the persons who are 'entitled to possess and enjoy the property. . . .'"

cert. denied, 444 U.S. 1080, 100 S.Ct. 1031, 62 L.Ed.2d 763 (1980).

In its *Jones* decision, the United States Supreme Court stated: "There can be little doubt about the general authority of civil courts to resolve [the] question [of church property ownership]." And, it ruled that when a court attempts to resolve that question, it may apply the neutral principles rule to inquire into "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property." But, it cautioned that, "in undertaking such an examination, a civil court must take special care to scrutinize the documents in purely secular terms." If a religious organization wishes to avoid searching examination into its documents, it may, "[t]hrough appropriate reversionary clauses . . . specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy."

The Supreme Court explained that the primary advantage of the neutral principles approach is that "it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." It "shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties."

The Supreme Court in *Jones* encouraged the states to adopt a "presumptive rule of majority representation," defeasible upon a showing that the identity of the local church is to be determined by some other means. We adopt the majority rule for control of church property in this state.

In *Bernson v. Koch,* 35 Colo. App. 257, 534 P.2d 334 (1975) this court applied a neutral principles approach set out in pre-*Jones* church property dispute cases, specifically,

the "formal title" approach suggested by *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970)(Brennan, J., concurring). Under the formal title approach, a court can "determine ownership by studying deeds, reverter clauses and general state corporation laws." Because the constitution of the local church construed in *Bernson* gave control of the corporate property to the members of the Church Council, which followed directives of the congregation, the *Bernson* court found that the majority of the voting members of the church was entitled to the use, possession, and enjoyment of the church properties.

To the same effect, the Vestry, the Episcopal equivalent of the *Bernson* Church Council, controlled the St. Mary's parish at the direction of the majority of members of the parish. Here, the local church does not have a constitution which expressly vests control of the local property in the majority. However, the formal title approach also requires that a court examine general state corporation laws. The laws under which this parish was incorporated provide for majority control of property. Thus, consistent with *Bernson,* we apply the neutral principles approach to grant title to the majority.

We will here examine the relevant church documents to determine whether that presumption has been overcome in this case.[2] The trial court found that it could not inquire into church property ownership, because it found that the Episcopal Church was hierarchical as to temporal as well as doctrinal matters. However, this inquiry stopped short

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[2] Normally, this court would remand for application of the legal principles announced herein to the facts. However, because all the relevant evidence in this case is documentary, and has been included in the record on appeal, in the interest of time, we have conducted our own examination of those documents. *See Grossman v. Sherman,* 198 Colo. 359, 599 P.2d 909 (1979)

of that required by the Supreme Court in *Jones, supra.* Under *Jones,* a court, when viewing a church property dispute, should not stop with the *general* conclusion that a church is hierarchical as to temporal matters. Rather, a court should *specifically* inquire as to whether the documents indicate that the parties intended to create a trust in favor of the general church. Because the trial court did not determine that the documents expressly created such a trust, its unquestioning deference to the diocesan decision which recognized the minority bordered on violating the establishment of religion clause of the First Amendment.

Upon conducting the search required by *Jones,* we find nothing in the deed, the articles of incorporation, the by-laws, or the canons or constitutions of the national church or the Colorado Diocese which creates an express trust in favor of the general church.

First, the deed is in the name of St. Mary's Church, with no reference to a trust in favor of the Diocese or national church. And, although it is true that St. Mary's formally acceded through its articles of incorporation and by-laws to the canons and constitution of the national church and the Colorado Diocese, there is nothing in either the articles or by-laws which creates a trust in the church property in favor of the national church or Diocese. There is also no language in the canons or constitution of the Diocese or national church which reserves such a trust. Thus, there is nothing here which indicates that the majority presumption should not apply.

Additionally, the local parish properly observed corporate procedures in voting to secede. The majority of the board of directors of a non-profit corporation manage the affairs of that corporation. Section 7-24-101, C.R.S. 1973. If the board of directors wishes to amend its articles of incorporation, it adopts a resolution setting forth the proposed amendment and directing that it be submitted to a

vote of the members, and a two-thirds vote of the members constitutes approval. Section 7-2-107, C.R.S. 1973. There is no evidence in the record to indicate that these procedures were not followed in this case. Accordingly, the majority's vote should be enforced by Colorado courts under general principles of law relating to non-profit corporations in this state.

Just as the Supreme Court did in *Jones,* we feel it advisable to counsel religious organizations that such intra-church disputes may be kept from the courts, if proper procedures are followed:

> "Under the neutral-principles approach, the outcome of the church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form."

Jones v. Wolf at 443 U.S. 606, 99 S.Ct. 3027, 61 L.Ed.2d at 786.[3]

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[3] Subsequent to the action discussed herein taken by the parish of St. Mary's, the above was accomplished by the Protestant Episcopal Church of the United States of America. In 1979, at its General Convention, the church adopted the following amendment to its canons: "[a]ll real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located."

The judgment is reversed and the cause is remanded for entry of judgment granting all real and personal property owned by the original St. Mary's Episcopal parish to the majority of the members of the original St. Mary's Episcopal parish, appellants herein.

JUDGE KIRSHBAUM and JUDGE TURSI concur.

APPENDIX C

SUPREME COURT, STATE OF COLORADO January 13, 1986

CASE NO. 83SC104

THE BISHOP AND DIOCESE OF COLORADO, a Colorado nonprofit corporation, THE REVEREND CHARLES LARRY DAY, ALLEN UYEDA, ROBERT DOUGLASS, H. DAVID HUSKIN, HARRY THOM, JOHN BROWN, JOSEPH ESCH, CARLA PARNELL, MILDRED MULLENAX, JOHN HELMORE, OTIS DRURY, MARIAN LATTIMORE, as members of the Vestry of the Episcopal Parish of St. Mary's, the EPISCOPAL PARISH OF ST. MARY'S, and EPISCOPAL CHURCH OF ST. MARY, a Colorado nonprofit corporation,

Petitioners,

v.

THE REVEREND JAMES O. MOTE, JOHN ARCHIBOLD, MARVIN OLSEN, JOHN BRAINERD, WAYNE GILL, CHRIS WOODBURY, RICHARD ATCHISON, CHARLES BUELL, RICK HILL, WALTER KULP, JAMES LUCERO, LORNE SCOFIELD, and SAINT MARY'S CHURCH, a Colorado nonprofit corporation,

Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED

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Attorney for Petitioners

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Forrest C. O'Dell
Wheat Ridge, Colorado

Attorneys for all Respondents except John Archibold

John Archibold
Denver, Colorado

Pro se

JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE KIRSHBAUM does not participate.

We granted certiorari to review the judgment of the Colorado Court of Appeals in *Bishop & Diocese of Colorado v. Mote,* 668 P.2d 948 (Colo. App. 1983) (*Mote*), involving a dispute over the control of the real and personal property of St. Mary's Church in Denver. The case arose as a result of the decision of a majority of the members of St. Mary's to secede from the national church, the Protestant Episcopal Church in the United States of America (PECUSA), because of differences over doctrine. The group remaining loyal to the general church[1] brought suit to determine the rights to the property of St. Mary's. The Denver District Court sustained the claims of the plaintiffs and decreed that rightful control of the church property was vested in the minority group who remained loyal to the general church. The court of appeals reversed, concluding that the church property should be awarded to the secessionist majority group of St. Mary's members. We elected to review the court of appeals' decision to determine whether that court erred in adopting certain legal standards to be applied in resolving church property disputes; whether the standards as adopted by the court of appeals, if proper, could be applied to the facts of this case to the detriment of the plaintiffs without resulting in an unconstitutional retroactive application of law; and whether the court of

[1] We sometimes use the term "national church" to refer to PECUSA and use the term "general church" to include the entire relevant church organization, including most pertinently the Colorado diocese as well as PECUSA.

appeals erred in holding that the facts as found by the district court did not establish that an express trust had been imposed upon the local church property in favor of the general church. We reverse.

I.

The essential facts as found by the district court are based in part on a stipulation by the parties, are supported by evidence in the record, and are not disputed here.

St. Mary's Church was first established as a mission within PECUSA in the 1930s and was incorporated under the laws of the state of Colorado in 1934. *See* §§ 2384-2399, Compiled Laws of Colorado (1921 and 1932 Supp.), now codified as amended as article 50 of title 7, 3 C.R.S. (1973 & 1985 Supp.) (relating to the incorporation of religious, educational and benevolent societies).[2] Legal title to the real and personal property at issue in this dispute was acquired and is held by the corporate entity, St. Mary's Church.

The original incorporators specified in their Affidavit of Incorporation that they had "unanimously decided to organize as a Protestant Episcopal Church under the diocese of Colorado with the corporate name of SAINT MARYS CHURCH." The diocese is one of the subordinate geographical units of the national church, PECUSA, and is

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[2] Prior to 1968, the incorporation of any religious society, including a church, was governed by the predecessor to article 50 of title 7, 3 C.R.S. (1973 & 1985 Supp.). The provisions of article 50, however, do not apply to any religious society formed after December 31, 1967, or to any religious corporation formed prior to January 1, 1968, "which has elected to accept the provisions of articles 20 to 29 of this title [the Colorado Nonprofit Corporation Act]." § 7-50-101(2), 3 C.R.S. (1973). Although not mentioned in the district court's findings, one witness testified that St. Mary's opted to be governed by the provisions of the Colorado Nonprofit Corporation Act, as permitted by section 7-50-101(2), on April 30, 1976. This was approximately six months before the schism within the local church. No party disputes this testimony.

presently incorporated as a Colorado nonprofit corporation under the name of The Bishop and Diocese of Colorado. The diocese is presided over by a bishop, who is both its chief ecclesiastical authority and the chief executive officer of its corporate entity. The diocese has a legislative and policy-making body called the Annual Convention and an executive body, the Diocesan Executive Council, which has the responsibility to carry out the policies and programs of the Annual Convention and has broad responsibility over financial and property matters in the diocese.

In 1954, the membership of St. Mary's sought to upgrade their status to that of a PECUSA parish within the diocese of Colorado. In seeking to be recognized as a parish, the membership of St. Mary's unanimously adopted a resolution acceding to the constitutions of the national church and of the diocese, recognizing the authority of the General Convention of PECUSA, the policy-making body of the national church, and promising obedience to the canons of the national church and of the diocese. The diocese approved the request.

In 1955, the year after it became a parish, St. Mary's requested and received the consent of the diocese to revise its articles of incorporation. The diocesan canons required, and still require, the consent of the bishop and the chancellor or vice-chancellor of the diocese before any parish may file or amend articles of incorporation.

The revised articles provided, among other things, that "[t]he objects and purposes for which said Parish is incorporated are to administer the temporalities of the Protestant Episcopal Church in the Parish"; that "the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado, a corporation, expressed by resolution of its Board of Trustee[s]"; and that the corporation "does hereby expressly accede to all the provisions of the constitution and canons adopted by the Gen-

eral Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the constitution and canons of the Diocese of Colorado." The articles of incorporation as amended in 1955 were not altered until 1976, when a majority of the membership of St. Mary's voted to disaffiliate from PECUSA.

Along with the amended articles of incorporation in 1955, St. Mary's adopted corporate bylaws. These bylaws provided that the governing authority of the corporation would consist of the parish rector as president, a senior warden, a junior warden, and nine vestrymen, all acting together as a Board of Trustees. Article II of the bylaws, captioned "Accession," provided that St. Mary's acceded to the constitution and canons of the diocese and the national church, and that "[t]he parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan." There was no change in the accession provision from 1955 until the disaffiliation in 1976.

Beginning in the early 1970s, several doctrinal controversies occurred within PECUSA concerning changes in the Book of Common Prayer, the authority of bishops to terminate marriages, the propriety of the ordination of women to the priesthood and other matters. In September of 1976, the General Convention of PECUSA approved the ordination of women to the priesthood. Two months later, at the Annual Convention of the Diocese of Colorado, the delegation from St. Mary's presented a resolution calling upon the diocese to withdraw from PECUSA in protest to the ordination of women and other actions taken by PECUSA. When the convention rejected the resolution, most of the members of the St. Mary's delegation walked out. On November 28, 1976, at a meeting of the membership of St. Mary's, the members voted 197 to 79 to withdraw from PECUSA and to amend the articles of incorporation by deleting all provisions recognizing the authority of PECUSA and the diocese. The secessionist ma-

jority voted a year later to affiliate St. Mary's Church with the newly formed Anglican Catholic Church.

Soon after the disaffiliation vote, the bishop met with the minority of St. Mary's members still loyal to PECUSA and formally recognized this minority as representing the PECUSA parish of St. Mary's. These individuals have since been meeting in quarters rented from another Denver church. The loyal minority elected new vestry members to govern the parish to replace those who had withdrawn from PECUSA. On December 14, 1976, the Diocesan Executive Council adopted a resolution declaring that the diocese "does not approve or recognize the action taken by St. Mary's Church to withdraw from the Diocese of Colorado, supports those members of St. Mary's Church who voted against such withdrawal, and affirms its ecclesiastical ties and its rights with respect to the non-profit corporation known as St. Mary's Church."

The secessionist majority refused requests and demands to surrender possession of the property of St. Mary's Church either to the diocese or the governing body representing those members of St. Mary's who remained loyal to PECUSA. For this reason, the plaintiffs, the group loyal to PECUSA,[3] filed suit in Denver District Court seeking

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[3] The plaintiffs include the members of the vestry, or governing board, representing those members of St. Mary's who voted in November of 1976 to remain affiliated with PECUSA; the parish priest, or rector, of the PECUSA parish of the Episcopal Church of St. Mary's appointed by the bishop after the schism; the nonprofit corporation formed in 1977 by those members of St. Mary's Church who had voted to remain affiliated with PECUSA; and the diocesan corporation, The Bishop and Diocese of Colorado. The defendants are those members of St. Mary's who are also members of the governing board representing those who withdrew from PECUSA; the former rector of St. Mary's Church, who is now the pastor of the group that disaffiliated from PECUSA and also a bishop in the Anglican Catholic Church; and St. Mary's Church, the Colorado nonprofit corporation controlled by the secessionist majority of the members of St. Mary's.

declaratory and injunctive relief, including the recovery of possession of all real and personal property of St. Mary's held by the secessionists. After a trial to the court, the district court, on January 21, 1980, found the facts as outlined above and decreed that the purported amendments of November 28, 1976, to the articles of incorporation of St. Mary's Church were ineffective and that the prior articles remained in effect; that all real and personal property to which the corporate entity, St. Mary's Church, held legal or equitable title as of November 28, 1976, "is rightfully under the dominion and control of the individual plaintiffs in this case, in their capacity as rector and members of the vestry of that church"; and that the individual defendants and other former members of St. Mary's who withdrew from PECUSA had no interest of any kind in the real and personal property to which St. Mary's Church held legal or equitable title as of November 28, 1976. The court directed the individual defendants to surrender possession and control of that property and to provide an inventory and accounting to the plaintiffs of any real and personal property of St. Mary's Church that the defendants transferred, sold, expended or conveyed after November 28, 1976. The court stated that after the accounting, the court would enter such further orders respecting damages as might be appropriate. The parties later entered into a stipulation as to the amount of damages, and the court approved that stipulation.

The trial court rendered its judgment after applying what is termed a "polity" analysis to the facts of this case. As part of this approach, the court concluded that PECUSA was a hierarchical church; that the authoritative decisionmaking bodies within that hierarchical church had determined that the loyal minority was the true "group which comprises St. Mary's Church" and was entitled to possession and control of the property held by St. Mary's Church; and that this determination by the appropriate

governing body of the hierarchical church organization must be deferred to and enforced by the civil courts.

The court of appeals reversed. The court of appeals held that the trial court erred by applying the "polity" approach in resolving this dispute rather than employing what is called the "neutral principles" analysis. *Mote,* 668 P.2d at 950-52. As part of the neutral principles analysis, the court of appeals adopted a "presumptive rule of majority representation" for local churches involved in disputes over control of church property, a presumption "defeasible" upon a showing that the identity of the church and control of the local church property "is to be determined by some other means." *Id.* at 952. After adopting this rule, the court of appeals examined the record only to determine whether an express trust over the property held by St. Mary's Church had been created in favor of the general church. *Id.* at 953. Finding no such express trust, the court of appeals concluded that control over the local church property was in the secessionist majority of the membership of St. Mary's. *Id.* That court reversed the judgment of the district court and remanded the case for entry of a judgment "granting all real and personal property owned by the original St. Mary's Episcopal parish to the majority of the members of the original St. Mary's Episcopal parish." *Id.* at 954.

The plaintiffs then filed a petition for certiorari, which we granted.

II. A.

There is no dispute as to who holds legal title to the church property—title is held by the corporate entity known as "St. Mary's Church." Nor is there any dispute as to which group is the "true" subordinate PECUSA church—the loyal minority has been recognized by the diocese as representing the PECUSA parish of St. Mary's. The only question presented in this case, as in *Jones v.*

Wolf, 443 U.S. 595, 602 (1979), is which of the two contending groups of the local church is entitled to possess and enjoy the church property.

The civil courts have the general authority to resolve this question. *Jones v. Wolf*, 443 U.S. at 602. The state has an obvious and legitimate interest in the peaceful resolution of property disputes and in providing a civil forum in which the ownership and control of church property can be determined conclusively. *Id.; Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445 (1969) (*Bull Hull*). However, the First Amendment to the United States Constitution[4] severely circumscribes the role that civil courts may play in resolving church property disputes. *Jones v. Wolf*, 443 U.S. at 602; *Blue Hull*, 393 U.S. at 449. Most importantly, the first amendment prohibits civil courts from resolving church property disputes by inquiring into and resolving disputed issues of religious doctrine and practice. *Id.; Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (*Serbian Orthodox Diocese*); *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam) (*Sharpsburg*). When a disputed issue of religious doctrine or practice is relevant to a property dispute, a civil court must defer to the resolution of that issue arrived at by the highest court, tribunal or controlling body of a hierarchical church organization. *Jones v. Wolf*, 443 U.S. at 602, 604; *Serbian Orthodox Diocese*, 426 U.S. at 709, 724-25; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871).

Subject to the foregoing limitations, however, the first amendment does not dictate that a state must follow a

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[4] The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

particular method of resolving a church property dispute. *Jones v. Wolf*, 443 U.S. at 602. "[A] state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.*, quoting *Sharpsburg*, 393 U.S. at 368 (Brennan, J., concurring) (emphasis in original).[5]

Although the Court stated in *Jones v. Wolf* that various constitutionally permissible approaches exist for analysis

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[5] Article II, Section 4, of the Colorado Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

There is no reason to believe that the limiting effect of article II, section 4, on the judicial resolution of church property disputes will differ from that of the first amendment as described in the text. *See Conrad v. City and County of Denver*, 656 P.2d 662, 667 (Colo. 1982) (article II, section 4, embodies the same values of free exercise and governmental non-involvement secured by the religious clauses of the first amendment, although determination of a first amendment challenge will not necessarily be dispositive of the state constitutional issue). *See also Americans United for Separation of Church and State Fund, Inc. v. State of Colorado*, 648 P.2d 1072, 1078, 1081-82 (Colo. 1982); *Zavilla v. Masse*, 112 Colo. 183, 187, 147 P.2d 823, 824-25 (1944). The court of appeals, in four church property dispute appeals, has never suggested an analytical distinction based on the Colorado Constitution. *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983); *Bishop & Diocese of Colorado v. Mote*, 668 P.2d 948 (Colo. App. 1983); *Bishop & Diocese of Colorado v. St. Paul's Episcopal Church of Central City*, 80CA0317 (Dec. 26, 1980) (not selected for official publication); *Bernson v. Koch*, 35 Colo. App. 257, 534 P.2d 334 (1975).

of a church property dispute, only two have been distinctly identified—the "polity" approach and the "neutral principles" approach.[6]

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[6] In a concurring opinion to the per curiam opinion in *Sharpsburg*, Justice Brennan identified a third approach—the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. 396 U.S. at 370. Since the neutral principles approach involves, among other things, an analysis of relevant state statutes, *Jones v. Wolf*, 443 U.S. at 603; *Sharpsburg*, 396 U.S. at 367 (per curiam) and at 370 (Brennan, J., concurring), it is not clear how this third alternative differs from a neutral principles analysis. Perhaps Justice Brennan made the distinction because he equated the neutral principles approach with what he called the "formal title" doctrine. 396 U.S. at 370. *See also Serbian Orthodox Diocese*, 426 U.S. at 723 n.15 (explaining that the court was not applying the "formal title" doctrine in that case). Also unclear is the distinction between neutral principles analysis and a "third method" identified by the court of appeals in *Bernson v. Koch*—the application of trust theories, which is there contrasted with the "formal title" approach of *Sharpsburg*, 35 Colo. App. at 262, 534 P.2d at 337. *And see Dickey v. Snodgrass*, 673 P.2d at 52 ("In resolving church property disputes, this court applies the neutral principles approach, specifically the 'formal title' approach."). Again, an examination of the evidence to see whether a trust has been imposed on the local church property in favor of the general church is a recognized part of a neutral principles analysis. *Jones v. Wolf*, 443 U.S. at 603-04. There is an indication that the trial judge in the present case was misled by the equation of the "formal title" doctrine—and the implications arising from its name—with the neutral principles approach. In his findings, the judge stated that the polity approach was the most appropriate means of resolving the dispute. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). He then stated: "Merely to identify the formal title holder would not be a reasonable or apt approach to this dispute because, of course, the critical issue has never been whether 'St. Mary's Church' as opposed to some other entity has title to the property." This was the only statement in the findings concerning the obvious rejection of the neutral principles approach urged by the defendants.

There is no explanation anywhere as to how the "formal title" doctrine differs from the neutral principles analysis, or how it might narrow or otherwise alter the analytical review of various documents, statutes and other relevant evidence as compared to a "broader" neu-

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The polity approach focuses primarily on the organizational structure of the church in question, i.e., whether the local church is congregational (independent) or whether it is a subordinate unit of a hierarchical organization. The polity approach was first utilized by the United States Supreme Court in *Watson v. Jones,* a case involving a church schism and property dispute that arose out of the civil war—a group of members of a local Presbyterian church in Kentucky withdrew from the national Presbyterian church rather than obey the national church's order to support the union and disavow slavery.

In *Watson,* the Court noted that when a local church is congregational in nature, that is, governed independently of any other ecclesiastical body, "the rights of [conflicting groups] to the use of the property must be determined by the ordinary principles which govern voluntary associations." 80 U.S. at 725. The courts should enforce the corporate and property decisions arrived at by a majority of members of the local church or "by such other local organism as [the congregational organization] may have instituted for the purpose of ecclesiastical government." *Id.* at 724. *See Sharpsburg,* 396 U.S. at 368-69 (Brennan, J., concurring).

However, when "the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that

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tral principles analysis. The "formal title" term seems to yield no assistance in explaining or defining the scope of review under the neutral principles analysis, and we decline to use it.

general organization," *Watson,* 80 U.S. at 722-23, a different method for resolving the dispute must be utilized. In such an instance, a court must defer to and enforce the decision of the highest church tribunal that has ruled as to a question of "discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727. As is shown by the holding in *Watson*—in which the court deferred to and enforced the resolution of the property dispute by the national Presbyterian church—issues of control over and rights to property are subsumed within that list. *See also Sharpsburg,* 396 U.S. at 369 (Brennen, J., concurring).

The absolute deference afforded to the determinations of hierarchical church tribunals in *Watson* was tempered by the holding in *Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1, 16 (1929), that such decisions will be enforced "[i]n the absence of fraud, collusion, or arbitrariness." The Court later narrowed this exception in *Serbian Orthodox Diocese,* holding that

> whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive

> criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits. . . .

426 U.S. at 713 (footnote omitted).

Watson v. Jones was decided at a time when the first amendment had not yet been applied to the states through the fourteenth amendment and was a pre-*Erie*[7] diversity case in which the Court purportedly applied federal common law. However, the Court later recognized that certain of the principles central to *Watson* are rooted in the protections of the first amendment. *See Jones v. Wolf,* 443 U.S. at 617 n.4 (Powell, J., dissenting); *Serbian Orthodox Diocese,* 426 U.S. at 710-11; *Blue Hull,* 393 U.S. at 446-48; *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94, 115-16 (1952). That the use of the polity analysis as articulated in *Watson* is not constitutionally mandated, however, is *made certain* by the holding of *Jones v. Wolf,* in which the use of the alternative neutral principles approach also was approved as consistent with the first amendment. 443 U.S. at 604.

2.

The neutral principles analysis first appeared in 1969 in *Blue Hull,* in which the United States Supreme Court reviewed on certiorari a church property dispute decision by the Supreme Court of Georgia. Under Georgia law, "the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." 393 U.S. at 441 (the "departure from doctrine" test). The United States Supreme Court held that the departure from doctrine test violates the first amendment because it forces a civil court

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[7] *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

to resolve issues of religious doctrine. Justice Brennan, writing for the majority, stated:

> It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.

393 U.S. at 449. The Court advised religious organizations to "structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Id.*

Next, in *Sharpsburg*, the Court dismissed an appeal from the Maryland Court of Appeals, stating in a per curiam opinion that the Maryland court's resolution of a church property dispute by relying upon "provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property," 396 U.S. at 367-68 (footnote omitted), did not involve an inquiry into religious doctrine, *id.* at 368. For that reason, the Court concluded, the appeal did not present a substantial federal question. *Id.* In a concurring opinion, Justice Brennan articulated the differences between the deference approach of *Watson* and the neutral principles approach recognized in *Blue Hull* and *Sharpsburg* and concluded that a state could adopt either approach, or any other, as long as the analysis involves no consideration of doctrinal matters, 396 U.S. at 368-70, a conclusion sub-

sequently embraced by a majority of the court in *Jones v. Wolf*, 443 U.S. at 602.[8]

Most recently, in *Jones v. Wolf*, the Court, reviewing a Presbyterian church schism and property dispute quite similar to the dispute now before us, explicitly held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." 443 U.S. at 604. In resolving the church property dispute, the Georgia court had examined state statutes, the corporate charter of the local church, and the constitution of the general church and had found no trust im-

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[8] The neutral principles analysis played no role in the resolution of the first post-*Sharpsburg* church dispute before the Court, *Serbian Orthodox Diocese*. *See* 426 U.S. at 723 n.15 ("neutral principles" being called there the "formal title" doctrine). *Serbian Orthodox Diocese* involved a challenge to the hierarchical church's defrockment of a bishop and division of a diocese, and only incidentally involved an issue as to control of property. *Id.* at 709, 723, 723 n.15. The Court held that the Illinois Supreme Court's inquiry into the validity of these ecclesiastical decisions by the mother church, and the reversal of such decisions, violated the First and Fourteenth Amendments to the United States Constitution.

> For where resolution of [religious] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not distrub the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

426 U.S. at 709. *See also Douglass v. First Baptist Church of Fort Collins*, 132 Colo. 286, 287 P.2d 965 (1955), in which we held that the First Baptist Church was a self-governing and independent religious congregation and that the decision of a majority of its members to disaffiliate from a national Baptist convention for doctrinal reasons was not open to attack in a civil suit by a dissenting minority of the congregation's members. *Douglass* arose prior to *Blue Hull* and *Sharpsburg*, but even if the neutral principles analysis had been articulated at that time, it could have played no role in the resolution of the particular structural dispute presented.

posed on the property for the benefit of the general church that would remove control over the property from the local church, the legal title holder. 443 U.S. at 601. The Court noted, however, that the determination that the local church, and not the general church, controlled the church property did not end the dispute. A remand was necessary to determine whether the schismatic majority or the loyal minority controlled the local church corporation and, thus, the property owned by the corporation. *Id.* at 606-10. The Court stated that the adoption of "a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, . . . would be consistent with both the neutral-principles analysis and the First Amendment." *Id.* at 607. However, the Court did not require Georgia to adopt a presumptive role of majority representation and stated that, if adopted, "the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Id.* at 608 (footnote omitted).

It can be said with little reservation that the majority opinion in *Jones v. Wolf* expressed a clear preference for the neutral principles approach over the polity approach, even while recognizing that a state could adopt a polity approach without violating the federal constitution:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law

> systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.
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> . . . .
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> The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. . . . The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

443 U.S. at 603-04, 606 (footnote omitted).[9]

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[9] Contrast those approving terms with the majority's opinion of the problems inherent in the polity approach:

> The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the

However, the majority did recognize that the application of the neutral principles approach is not "wholly free of difficulty" and noted:

> The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Id. at 604.

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polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." *Post,* at 619-620. In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." *Serbian Orthodox Diocese,* 426 U.S., at 723. The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

Jones v. Wolf, 443 U.S. at 605 (brackets in original).

B.

Having outlined the two possible approaches for resolving this church property dispute that have received explicit approval by the United States Supreme Court, we next must decide which analytical method we will adopt and apply in resolving this dispute. Unlike the appellate courts of many states,[10] this court has never addressed a church

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[10] Most courts faced with a post-*Jones* church property dispute did not have to choose between the polity approach and the neutral principles approach without precedential guidance. They simply noted that prior case law or statutes in their state required or suggested that one or the other approach be utilized. *E.g., Harris v. Apostolic Overcoming Holy Church of God, Inc.*, 457 So.2d 385, 387 (Ala. 1984) (neutral principles); *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 171 Cal. Reptr. 541, 548-49 (Cal. App.), *cert. denied*, 454 U.S. 864 (1981) (neutral principles); *New York Annual Conference of the United Methodist Church v. Fisher*, 438 A.2d 62, 68 (Conn. 1980) (polity approach); *Grutka v. Clifford*, 445 N.E.2d 1015, 1019 (Ind. App. 1983), *cert. denied*, 104 S. Ct. 998 (1984) (neutral principles); *Fluker Community Church v. Hitchens*, 419 So.2d 445, 447-48 (La. 1982) (neutral principles); *Graffam v. Wray*, 437 A.2d 627, 634 (Me. 1981) (neutral principles); *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 464 A.2d 1008, 1016 (Md. 1983), *cert. denied*, 104 S. Ct. 1287 (1984) (neutral principles); *Antioch Temple, Inc. v. Parekh*, 422 N.E.2d 1337, 1340-42 (Mass. 1981) (polity); *Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. App. 1982) (polity); *Piletich v. Deretich*, 328 N.W.2d 696, 701-02 (Minn. 1982) (neutral principles); *Protestant Episcopal Church v. Graves*, 417 A.2d 19, 23-24 (N.J. 1980), *cert. denied sub nom. Moore v. Protestant Episcopal Church*, 449 U.S. 1131 (1981) (polity); *Southside Tabernacle v. Pentecostal Church of God*, 650 P.2d 231, 235 (Wash. App. 1982) (polity); *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923-24 (W. Va. 1984) (polity). A few courts chose a neutral principles approach after deciding not to follow more or less explicit polity precedents. *E.g., York v. First Presbyterian Church of Anna*, 474 N.E.2d 716 (Ill. App. 1984), *cert. denied*, 106 S. Ct. 183 (1985); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 105 S. Ct. 2361 (1985); *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317 (Pa.), *cert. denied*, 106 S. Ct. 198 (1985); *Foss v. Dykstra*, 319 N.W.2d 499 (S.D. 1982). And in *Fonken v. Community Church of Kamrar*, 339 N.W.2d 810 (Iowa

property dispute arising out of a church schism. Thus, we are not bound by direct precedent in deciding whether to apply a neutral principles or a polity analysis to the facts of this case.

We conclude that the neutral principles approach is preferable, and we adopt that analytical method as the law to be applied by Colorado courts when resolving disputes over the ownership and control of church property in this state.[11] We reach this conclusion principally because we are persuaded by the reasoning of the United States Supreme Court in *Jones v. Wolf* as to the advantages of the neutral principles approach, 443 U.S. at 603-04, 606 (quoted above).

Our decision to adopt the neutral principles approach is buttressed by the analysis adopted by the Colorado Court of Appeals in recent opinions concerning disputes over church property. That court has reviewed four such disputes within the last decade, beginning with *Bernson v. Koch*, 35 Colo. App. 257, 534 P.2d 334 (1975). In all of them, the court of appeals applied a neutral principles analysis.

Bernson, a pre-*Jones* case, involved a dispute between two contending groups within the membership of Mt. Olive

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1983), the Iowa Supreme Court had no precedent requiring the selection of one approach over the other, but the court avoided the issue by applying both polity and neutral principles (reaching the same result) without expressing a preference for either one.

[11] We recognize, however, as has the United States Supreme Court, that there may be cases in which interpretation of relevant documents would require a civil court to resolve a religious controversy. *Jones v. Wolf*, 443 U.S. at 604. In such instances, "the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* Moreover, we do not foreclose the application of a polity analysis in a case in which, for reasons presently unforeseen, constitutional constraints on evidence that a court could consider would either prevent a definitive resolution of a church property dispute or would so far preclude consideration of facts relevant to such a resolution as to prevent a just result under a neutral principles analysis.

Evangelical Lutheran Church of Colorado Springs over one group's attempted withdrawal of the church from the Wisconsin Evangelical Lutheran Synod. 35 Colo. App. at 259-60, 534 P.2d at 335-36. The trial court held for the plaintiffs, the members loyal to the synod, in their suit to determine control over the church property. 35 Colo. App. at 261, 534 P.2d at 336. The court of appeals reversed.

The court of appeals first held that the trial court erred in the conclusion reached when applying the polity approach, as the trial court had found on sufficient evidence that Mt. Olive Church was an independent, self-governing religious congregation. 35 Colo. App. at 263, 534 P.2d at 337. As a result, "the proper church governing body was the . . . congregation, and not the Synod." *Id.* The court of appeals then went on to say:

> However, there is a more compelling reason for reversal of the trial court's judgment. As the concurring justices in *Sharpsburg* noted, courts may not use the polity approach if it involves consideration of doctrinal matters. Indeed, it has been stated that determination of a church's polity "will almost inevitably involve ecclesiastical considerations." *Merryman v. Price*, 147 Ind. App. 295, 259 N.E.2d 883, *cert. denied*, 404 U.S. 852 . . . . The present case furnishes an example of such entanglement of polity and doctrine. Plaintiffs' evidence included testimony to the effect that certain religious documents are susceptible of only one legitimate interpretation and that all members of the Church are, therefore, bound to adhere to the interpretation announced by the Synod. Thus, plaintiffs' evidence was that the Church's assertedly hierarchical structure is based, at least in part, upon a doctrinal belief. Therefore, since we are prohibited by First Amendment principles from using the polity approach, we employ the formal title method for

> resolution of church property disputes as suggested in the *Sharpsburg* case.

35 Colo. App. at 263, 534 P.2d at 337-38. Applying the neutral principles analysis, the court of appeals concluded that title was in the local church corporation, 35 Colo. App. at 263-64, 534 P.2d at 338; that no trust had been imposed on the property for the benefit of the general church, as the corporation charter referred only to the "Evangelical Lutheran Church" and not to the "Wisconsin Evangelical Lutheran Synod," 35 Colo. App. at 265-66, 534 P.2d at 338-39; and that the court of appeals would not enforce a provision in the church constitution relating to church schisms as to do so would require the resolution of an ecclesiastical dispute, i.e., which contending group had adhered to the church constitution, 35 Colo. App. at 264-65, 34 P.2d at 338.

Bishop & Diocese of Colorado v. St. Paul's Episcopal Church of Central City, 80CA0317 (Dec. 26, 1980), an unpublished opinion released prior to *Mote* but after *Jones v. Wolf*, involved facts almost identical to the instant case—a schism within a local PECUSA parish and a resulting church property dispute. The court of appeals applied a neutral principles analysis, finding this approach consistent with *Jones v. Wolf*, *Blue Hull* and *Bernson v. Koch*. Slip op. at 2. The court of appeals affirmed the district court's finding that the articles of incorporation of the local church imposed an express trust upon the property in favor of the general church. The court of appeals did not analyze the articles extensively, concluding simply that a provision that stated that the articles of incorporation were executed for the purpose of "erecting, holding, furnishing, and keeping in repair a church edifice and of maintaining religious services therein according to the forms and faith of the Protestant Episcopal Church of the United States" unambiguously created a trust in favor of the general church. Slip op. at 1, 3. Certiorari was denied in *St. Paul's Episcopal Church*. 81SC68 (June 22, 1981).

St. Paul's Episcopal Church was followed by *Mote*, the present case, in which the court of appeals adopted and applied the neutral principles analysis along with a presumptive rule of majority representation defeasible only, as applied in that case, if the documents indicate that the parties intended to create an express trust in favor of the general church. 668 P.2d at 952-53. Examining the deed, the articles of incorporation of St. Mary's Church, the corporate bylaws, the canons and constitutions of the national church and the local diocese, and the nonprofit corporation statutes, the court found no language creating a trust in favor of the general church. *Id.* The contrary finding in *St. Paul's Episcopal Church* was not mentioned.

The final case, *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983), began when officers of the national organization of the African Methodist Episcopal Church attempted to convey the church property of the African Methodist Episcopal Church of Mesa County to certain property investors. The plaintiffs, who asserted that they were the trustees for the local church, sued to quiet title in themselves. *Id.* at 52. The court of appeals affirmed the trial court's judgment that the national church had no right, title or interest in the local church property. *Id.* The court began:

> In resolving church property disputes, this court applies the neutral principles approach, specifically the "formal title" approach suggested by [*Sharpsburg*, 396 U.S. at 370] (Brennan, J., concurring). *See Bishop & Diocese v. Mote*, 668 P.2d 948 (Colo. App. 1983) (*cert. granted on other grounds* August 23, 1983); *Bernson v. Koch*, 35 Colo. App. 257, 534 P.2d 334 (1975). On this basis, a court can "determine ownership by studying deeds, reverter clauses, and general state corporation laws." *Bernson, supra.*

Id. Applying that analytical method, the court determined that the record revealed that the property at issue had been conveyed to the African Methodist Episcopal Church of Mesa County; that the deed contained no trust language or reverter clause; that the incorporated local church had not conveyed its title to the property to the national church, although required to do so by the national church's Rules of Discipline; and that a provision in the local church's incorporation articles adopting the Rules of Discipline of the national church as the local church's mode of government did not give the national church any rights in the property. *Id.*

Although these decisions by the court of appeals do not bind us to adopt and apply the neutral principles approach, they lend support to our decision to do so. A holding consistent with the court of appeals' ten-year history of applying neutral principles of law to resolve church property disputes will promote the desirable goals of stability in the law and reinforcement of settled expectations.

We derive further support for our decision to apply neutral principles from a turn-of-the-century decision of this court. In *Horst v. Traudt*, 43 Colo. 445, 96 P. 259 (1908), we held that religious corporations "are subject to the principles of the common law and the practice and procedure applicable to corporations under the general incorporation laws, so far as the same are pertinent." 43 Colo. at 448, 96 P. at 259. *Horst* involved a suit by members of The First German Congregational Church at Globeville against Traudt to prevent Traudt from taking office as church pastor pursuant to a call from the ruling elders of the church, a call that the plaintiffs alleged to have been illegally obtained by the defendant at a meeting of the church congregation. 43 Colo. at 447, 96 P. at 259. We stated at the outset:

> The allegations of the complaint present no questions involving ecclesiastical matters or affairs;

> the sole question presented is the right of defendant to exercise and discharge the duties and receive the emoluments of pastor of the church, under a contract with the church which plaintiffs allege was illegally obtained by the defendant.

Id. We then held as noted above and equated the trustees, wardens, vestrymen or other officers of a church corporation with the directors and officers of a corporation formed under the general incorporation laws and equated the church members with such a corporation's shareholders. 43 Colo. at 448, 96 P. at 259-60. We affirmed a dismissal of the suit, declining to alter the general rule that "[t]he courts will not, . . . at the suit of a stockholder, or any number of stockholders, interfere with the internal affairs and management of a corporation," absent certain preconditions not present in that case. 43 Colo. at 448, 96 P. at 260.

As *Horst* did not involve a dispute between a local church and a general church, or a dispute over rights to church property, it is not controlling in this case. We derive general guidance from it, however, as a persuasive statement that this court should analyze legal issues that arise out of church organizations in the same manner as we would analyze those issues if they arose out of any other corporation or voluntary association.

C.

Although we agree with the court of appeals that neutral principles of law should be applied in resolving the present dispute, we disagree with the manner in which that court applied the standard in this case.

1.

The court of appeals first adopted a presumptive rule of majority representation. *Mote*, 688 P.2d at 952. *See also*

Jones v. Wolf, 443 U.S. at 606-10. The court stated that the presumption would be "defeasible upon a showing that the identity of the local church is to be determined by some other means." 668 P.2d at 952. It then examined the deeds, the articles of incorporation, the by-laws, and the canons and constitutions of PECUSA and of the diocese to determine whether these documents created an express trust in the church property in favor of PECUSA or the diocese. Concluding that no trust had been created and that statutorily required procedures had been followed by St. Mary's in voting to secede, the court of appeals held that the presumption of majority representation had not been rebutted and that judgment should be entered by the trial court "granting all real and personal property owned by the original St. Mary's Episcopal parish to the majority of the members of the original St. Mary's Episcopal parish." *Id.* at 954.

We consider it more consonant with a truly neutral analysis to consider first, without the application of any presumption, whether the instruments of conveyance, church documents and other relevant evidence establish that the general church has rights of ownership or control over the disputed church property by reason of a trust, a reverter clause, or some other basis. If, after applying neutral principles of law, such rights of ownership or control are determined to be vested in the general church, there will be no need to assess how property of the local church is controlled.[12] If, on the other hand, such an analysis results in a determination that ownership or control of the disputed property is vested in the local church, it then may be necessary to determine how control over that property

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[12] Ultimately, we determine that the case now before us does not require that we resolve how power over corporate property is to be exercised within St. Mary's Church. We believe it necessary to address the correctness of the court of appeals' adoption of a presumptive rule of majority representation, however, because it is an integral part of that court's neutral principles analysis.

is to be exercised. This is so because, as the United States Supreme Court recognized in *Jones v. Wolf*, determination of control of the local church in cases involving a dispute between contending groups within that church may be necessary to resolve internal differences concerning the use and disposition of the property of the local church.

However, we decline to adopt a presumptive rule of majority representation, or any other artificial presumption or rule, that must be applied in every case in which determination of control over property of a local church becomes necessary. Rather, we look for guidance to well-established principles of statutory and common law traditionally applied to determine who has legal control over any particular corporation or voluntary association and how freely or extensively that control can be exercised. We note, as one example, that a presumptive rule of majority representation would not be consistent with various provisions of the Colorado Nonprofit Corporation Act, such as the requirement in section 7-21-107(1)(b), 3 C.R.S. (1985 Supp.), that the articles of incorporation of a nonprofit corporation may be amended only when the proposed amendments receive at least two-thirds of the votes that corporation members are entitled to cast. A simple majority vote would not be legally sufficient.

2.

Additionally, and of more importance, in applying neutral principles analysis to the relevant evidence in this case, the court of appeals too narrowly restricted the scope of the permissible inquiry. When the court of appeals applied the neutral principles standard, the court reviewed the record only to determine whether the documentary evidence explicitly imposed an express trust over the property in favor of the general church. *Mote*, 668 P.2d at 953. Finding none, the court held that the majority presumption must apply. *Id.*

It is possible to view this approach to the neutral principles analysis as incorporating an unduly restrictive rule of evidence, *see Jones v. Wolf*, 443 U.S. at 610-21 (Powell, J., dissenting), precluding the trial courts from considering evidence relevant to a church property dispute that is not couched in the traditional forms and language of trust law. While it is not possible for us to delineate exactly the scope of the inquiry that must be applied in every case of this type, there are several reasons why it is unnecessary for the civil courts to apply the neutral principles analysis in so narrow a manner.

First, a narrow inquiry is not constitutionally mandated. The majority in *Jones v. Wolf* noted that the states are free to adopt any of various approaches for settling church property disputes so long as the method chosen involves no resolution of doctrinal matters. 443 U.S. at 602, 608. Even if the majority opinion in *Jones* can be characterized as preferring a narrow, restrictive express trust version of the neutral principles analysis, there is no reason that Colorado must follow suit, as long as this court's analysis does not trespass into the forbidden area of resolving doctrinal issues. *Id.*

Second, the majority opinion in *Jones v. Wolf* discusses in general terms the need to rely on established concepts of trust and property law. *Id.* at 603, 604, 606. The Court did *not* restrict the inquiry to a search for explicit language of express trust. Colorado recognizes that the intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties. *See Ayers v. King*, 665 P.2d 594, 595 (Colo. 1983); *Denver Chapter No. 145, Order of Ahepa v. Mile Hi City Chapter No. 360*, 171 Colo. 541, 547, 469 P.2d 740, 743 (1970); *Fleming & Pattridge v. Singer*, 168 Colo. 195, 200, 450 P.2d 635, 637 (1969); 1 A. Scott, *The Law of Trusts*, §§ 24, 25 (3rd Ed. 1967). While such an inference is not to come easily—

"[c]lear, explicit, definite, unequivocal and unambiguous language or conduct" establishing the intent to create a trust is required, *Morgan v. Wright*, 156 Colo. 411, 415, 399 P.2d 788, 790-91 (1965) (quoting 89 C.J.S., *Trusts*, § 45); *see also Matter of Estate of Daniels*, 665 P.2d at 595; *Fleming & Pattridge v. Singer*, 168 Colo. at 200, 450 P.2d at 637—no *particular* language must be used to create a trust or to manifest the necessary intention to create a trust. *Noonan v. Stein*, 56 Colo. 64, 71, 136 P. 1181, 1183 (1913); *Sims v. Baker*, 30 Colo. App. 590, 597, 498 P.2d 960, 964 (1972); 1 A. Scott, *The Law of Trusts*, §§ 24, 25. There is no need to restrict the inquiry, as the court of appeals did in *Mote*, even if this court is searching only for evidence of a trust relationship. Moreover, other principles from the common and statutory law of property, contracts, corporations or voluntary associations might be the basis for a determination that a general church has a right, title or interest in the church property, requiring a more extensive inquiry.

Third, to say that the court may analyze only those provisions in the relevant documents that relate to control over the property in question, *see Jones v. Wolf*, 443 U.S. at 604, is but a truism reflecting the concept that only *relevant* evidence may be considered. This truism need not mean that a certain document or provision, obviously relevant to the determination of the parties' intent as to who will control the church property, cannot be considered solely because it does not relate exclusively to or contain the language of traditional property and trust law. If the evidence is competent and has probative value in resolving the central issue in dispute, it should be admitted and considered. *See People v. Lowe*, 660 P.2d 1261, 1264 (Colo. 1983) (Colorado Rules of Evidence strongly favor the admission of evidence). A number of courts have considered documents not traditionally associated with trust and property law, or provisions in documents not solely couched in the traditional terms of trust and property law, as part

of a neutral principles analysis. *E.g., Hinkle Creek Friends Church v. Western Yearly Meeting of Friends Church*, 469 N.E.2d 40 (Ind. App. 1984); *United Methodist Church v. St. Louis Crossing Independent Methodist Church*, 276 N.E.2d 916 (Ind. App. 1971) (pre-*Jones*); *Fonken v. Community Church of Kamrar*, 339 N.W.2d 810 (Iowa 1983); *Fluker Community Church v. Hitchens*, 419 So.2d 445 (La. 1982); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 105 S. Ct. 2361 (1985); *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 464 N.E.2d 454 (N.Y.), *cert. denied*, 105 S. Ct. 514 (1984); *Foss v. Dykstra*, 342 N.W.2d 220 (S.D. 1983).[13]

Fourth, *Jones v. Wolf* does not require the civil courts to shy away from those documents, or provisions in documents, that intertwine religious concepts with matters otherwise relevant to the issue of who controls the property. As noted earlier, the neutral principles analysis as sanctioned by the United States Supreme Court includes the examination of church documents, i.e., the constitution and canons of the local and general church. *Jones v. Wolf*, 443 U.S. at 600-01, 603, 604; *Sharpsburg*, 396 U.S. at 367. The civil courts are free to consider such documents. The

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[13] In *Dickey v. Snodgrass*, 673 P.2d 51 (Colo. App. 1983), a panel of the court of appeals acknowledged that the court of appeals had adopted the neutral principles approach in *Mote* and in *Bernson v. Koch*. *Id.* at 52. In explaining the application of neutral principles analysis, the court did not confine the judicial function to searching the record exclusively for provisions of express trust in favor of the general church. Rather, the court stated generally:

> On this basis [the neutral principles approach], a court can "determine ownership by studying deeds, reverter clauses, and general state corporation laws." *Bernson, supra.* Applying this analysis, we conclude that there is sufficient evidence in the record to support the trial court's determination that National, and therefore Investors, has no right, title, or interest in the property.

Id.

only limitations are that the courts must not resolve church property disputes on the basis of religious doctrine and practice, *Jones v. Wolf*, 443 U.S. at 602, and therefore must defer to the church's authoritative resolution of any doctrinal issue necessarily involved in interpreting or applying the provisions of such instruments, *Id.* at 602, 604, if that resolution is brought to the court's attention in a manner clearly recognizable as a definitive resolution.

Fifth, and finally, if there is a schism in the local church and it is determined from the relevant evidence that a trust was not imposed on the disputed church property for the benefit of the general church—a determination made by the court of appeals in the present case—the required analysis is not at an end. As recognized in *Jones v. Wolf*, it then becomes necessary to pursue a further inquiry to determine how decisions concerning use of church property are made within the local church. 443 U.S. at 606-10. This inquiry can be as broad as is necessary to encompass all relevant considerations, as long as the inquiry does not require resolutions of disputed issues of religious doctrine. *Id.* at 608.

We have rejected the court of appeals' adoption of the presumptive rule of majority representation in favor of a more traditional and general inquiry as to the locus and nature of control in the local organization. The court of appeals' opinion, however, demonstrates that the court did not conduct *any* inquiry on this point. The court of appeals first determined that an express trust had not been created in favor of the general church and, therefore, that the local church corporation controlled the property to which it held the title. *Mote*, 668 P.2d at 953-54, It did not go further and examine the record to determine whether the secessionist majority controlled the corporation to the necessary extent to control the property. Rather, the court of appeals automatically assumed that a rule of majority representation operated to control the local corporation in all relevant respects. *Id.* For these reasons, even if we

agreed with the court of appeals' conclusion that no trust was created in favor of the general church—but we do not—we would be compelled to conclude that its analysis of the issue of control within the local church organization was unduly restricted in scope and therefore fundamentally flawed.

III.

Having articulated the proper legal standards for resolving church property disputes in general, we next apply those standards to the facts of the dispute before us.

A.

One issue not addressed by the parties is whether we should remand this matter to the district court for application of the proper standards rather than definitively resolving the dispute as part of the present certiorari review. Support for a remand can be found in *Foss v. Dykstra*, 319 N.W.2d 499 (S.D. 1982), in which the South Dakota Supreme Court held that the lower court erred by applying a polity approach rather than neutral principles to resolve a church property dispute and remanded the case with directions to the trial court to determine ownership by application of neutral principles. *Id.* at 500. *See also Foss v. Dykstra*, 342 N.W.2d 220 (S.D. 1983) (appeal after remand).

Although the court of appeals concluded here that the trial court erred in its choice of the legal analysis to apply to the facts, the court did not order a remand. In its view, resolution of the dispute at the appellate level was appropriate because all the relevant evidence is documentary and a remand would unnecessarily delay final resolution. *Mote*, 668 P.2d at 953 n.2.

We do not agree with the court of appeals that all the competent and relevant evidence in this case is necessarily

documentary. It may be, in the final analysis, that the evidence determinative of the dispute is limited to documentary evidence. However, much of the testimonial evidence concerning the interpretation of various documentary provisions and the historical relationship between the parish and the diocese has at least peripheral relevance and must be evaluated and weighed in arriving at a final resolution.

We do agree with the court of appeals, however, that a remand is not necessary here. In the district court, the plaintiffs presented evidence and argued legal theories not only by polity but also of trust and contract law. The defendants presented a defense based not only on their contention that a polity analysis would reveal that PECUSA was not hierarchical as to property matters, but also that a neutral principles analysis was preferable and would result in a finding that control over the property was in the local church majority. The trial court declined to address the plaintiff's alternative trust and contract theories because it decided to apply a polity analysis to the facts. There is absolutely no indication that the trial court's decision to apply a polity approach was fixed in advance of trial or that this decision limited the evidence presented or the evidentiary facts found in any significant way. Thus, a remand for an evidentiary hearing is not necessary to assure that an opportunity has been afforded for presentation of all evidence relevant to a neutral principles analysis.

Furthermore, many facts have been stipulated and the other relevant facts are not in dispute except for the ultimate finding and conclusion as to whether the facts found establish that a trust was imposed upon the local church property for the benefit of the general church. Because it chose to apply a polity analysis, the district court declined to make a finding on the trust issue; obviously, the parties are not in agreement on this matter.

Finally, all parties have presented argument in this court and in the court of appeals on the proper application of the neutral principles analysis to the facts of the dispute.

Given this record, we an as easily apply the legal principles to the facts as could the trial court, and doing so will likely save further appeals such as occurred in *Foss v. Dykstra*. In the interest of judicial economy, we elect to resolve this dispute in this opinion rather than ordering a remand.

B.

Applying a neutral principles analysis to the facts, we conclude that the court of appeals erred when it held that the evidence does not show the imposition of a trust upon the real and personal property of St. Mary's in favor of the general church.[14]

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[14] The defendants argue that this court should not address the issue of whether an express trust in favor of the general church has been created because this legal theory was neither pleaded nor proved by the plaintiffs. The defendants claim that only an implied trust theory was invoked by the plaintiffs. The defendants are wrong, but clearing up a semantic problem is necessary to explain why. As one claim for relief in the third (and last) amended complaint, the plaintiffs outlined the facts generally as the trial court later found and stated that these facts established the imposition of a trust in favor of the general church on the local church property. In the prayer, the plaintiffs asked for a declaration that the church property was impressed with a trust in favor of the diocese and PECUSA. The plaintiffs likely chose this legal theory, along with alternative polity and contract theories, in part because of the court of appeals' statement in *Bernson v. Koch* that one of the analytical methods by which it may be found that a general church controls local church property is the use of trust theories purged of doctrinal overtones. 35 Colo. App. at 262, 534 P.2d at 337 (contrasted there with the "formal title" doctrine, *see* footnote 6, above). The plaintiffs were aware of the fact that there was no document, or provision in a document, explicitly stating that the parish property was held in trust for PECUSA or for the diocese, and they so stipulated prior to trial. However, the plaintiffs argued that language in various

There can be no doubt that legal title to the disputed real property is held by St. Mary's Church, the nonprofit corporation created by the membership in 1934. The relevant deeds simply name the grantee as St. Mary's Church. There is no reference in the deeds to PECUSA or its Colorado diocese, and the deeds contain nothing to indicate that St. Mary's will hold these properties in trust for any person or body. Furthermore, the parties stipulated that the diocese "has not given or transferred real property" to St. Mary's, and the record indicates that the diocese never paid for the property or provided direct financial support to the parish for the acquisition of property.

The natural course of the inquiry then is to determine whether the plaintiffs have met their burden of presenting other evidence to establish that effective control over these properties is not reposed in the legal title holder, but rather that the local church property has been dedicated to the use and control of the general church. We conclude that an intent on the part of the local church corporation to dedicate its property irrevocably to the purposes of PE-

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provisions of the documents and the facts of the historical relationship between the local and general church implied the intent to create a trust in favor of the general church.

By labeling this legal theory as one of "implied trust," it seems apparent that the attorneys for the plaintiffs did not intend to use the term "implied trust" as it is sometimes used in Colorado—i.e., encompassing the equitable trust called a resulting trust or the remedy called a constructive trust that arise despite the lack of an intent to create a trust on the part of the grantor. *See Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Rather, the plaintiffs were arguing for, in the want of a better term, an express trust created by implication in fact. As is noted in the text at pp. 29-30, the intent to create an express trust may be inferred from the nature of certain property transactions, the circumstances surrounding the holding of property, particular documents or language employed in the holding of property and/or the conduct of the parties. The plaintiffs have been arguing from the beginning for an "express" trust result, although not explicitly labelled so.

CUSA was expressed unambiguously in the combination of the 1955 articles of incorporation, the local church by-laws, and the canons of the general church, to which the local church acceded in its articles at the time this dispute arose in 1976. This construction is reinforced by the conduct of the relevant officials of the local and general church.

The 1955 articles do not contain an explicit declaration of a trust in favor of the general church. Clause 1 of the articles, however, states in relevant part:

> The objects and purposes for which said Parish is incorporated are to administer the temporalities of the Protestant Episcopal Church in the Parish and to carry on and conduct religious, educational and benevolent institutions and works; to acquire by lease, purchase, gift or otherwise, hold, use and enjoy, let, sell, mortgage, convey or otherwise dispose of, any and all real estate and personal property as may be determined by said corporation to be beneficial or useful in carrying out said purposes, and particularly to acquire, hold, use and enjoy all of the property, now held for the members of said church in the City and County of Denver, and State of Colorado . . . .

It was not disputed that the term "temporalities" referred, at least in part, to the real property of which the local church is the legal title holder. Clause 1 goes on to provide that "the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado, a corporation, expressed by resolution of its Board of Trustee[s]." Clause 2 of the articles then provides

> The corporation now in existence by its Charter as herein amended does hereby expressly accede to all the provisions of the constitution and can-

> ons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the constitution and canons of the Diocese of Colorado.

These two clauses, made part of St. Mary's basic organizational document, strongly indicate that the local church property was to be held for the benefit of the general church, and they show the extensive nature of the policy direction and property control to be exercised by the general church. There are no provisions in the articles implicitly or explicitly expressing an intent to the contrary. Furthermore, the parties stipulated that the "Rectors and vestry of St. Mary's Church have acknowledged their status as a local unit within the Episcopal Church and have accepted the benefits of that affiliation for more than 40 years." The parties further stipulated, or the trial court found, that the rector and members of St. Mary's have assumed an active role in diocesan affairs, particularly by sending representatives to the annual conventions of the diocese and by accepting appointments to various permanent bodies and positions within the diocese, that the local church submitted to the diocese annual reports concerning rites, salaries and the value of property, and that the local church officials have sought the permission of the diocese before attempting to encumber parish property.

The corporate bylaws of St. Mary's Church contain little that is relevant to this dispute with the exception of article II, which provides:

> The Church and Parish accede to the Constitution and Canons of The Protestant Episcopal Church in The United States of America, and the Ecclesiastical Authority and Canons of the Diocese of Colorado.

> The parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan.

An exercise of unbridled control over church property by the local church corporation would conflict with several provisions in the PECUSA and diocesan canons, which will be examined next along with the PECUSA and diocesan constitutions.

In 1976, the constitutions and canons of PECUSA and the diocese did not contain any provision explicitly recognizing a trust on parish property in favor of the general church.[15] Our review of the PECUSA constitution discloses

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[15] In September of 1979, PECUSA amended Title 1, Canon 6, of its canons to add a new section 4 providing the following:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons.

A new section 5 was also added to this canon at the same time, providing that "[t]he several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action but no such action shall be necessary for the existence and validity of the trust." The plaintiffs argue that this clause merely confirmed the established customs, practices and usages within PECUSA. The New Jersey Supreme Court agrees. *Protestant Episcopal Church v. Graves*, 417 A.2d 19, 24 (N.J. 1980), *cert. denied sub nom., Moore v. Protestant Episcopal Church*, 449 U.S. 1131 (1981). Not surprisingly, the defendants argue that the new canonical provision created a trust over local church property in favor of the general church in 1979 where one did not exist before. As concerns the particular manner by which St. Mary's held property, we agree with the plaintiffs that the 1979 amendment did nothing but confirm the relationships existing among PECUSA, the diocese and the parish of St. Mary's.

nothing that appears relevant to the dispute before us, other than the general description of the governing structure of the church. Certainly, the parties have not pointed to or offered into evidence any particular article of this constitution as relevant.

However, two sections of Canon 6 of Title 1 of the PECUSA canons are relevant in again showing the measure of control over local church property that is intended to be exercised by the general church. Section 3 provides:

> No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation, or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese.

Section 1(6) of that canon further provides that "[a]ll buildings and their contents shall be kept adequately insured."

Canon 12 of Title 1 of the PECUSA canons provides for the setting of parish boundaries and the formation of new parishes and provides that every congregation shall belong to the diocese in whose geographical area its place of worship is situated. Section 3(c) of Canon 12 then provides that "[t]his Canon shall not affect the legal rights of property of any Parish or Congregation." The defendants freight this clause with ultimate meaning, i.e., as proof that all legal rights to property are held by the local church. But the limitation in section 3(c) itself to the narrow matters addressed in Canon 12 casts doubt on any attempt to give it expansive meaning, as do inconsistent provisions elsewhere within the canons of the general church and of the diocese.

Finally, section 2 of Canon 7, Title II, further indicates the control exercised by the general church over local church property, as it provides:

> No dedicated and consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of for any worldly or common use, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

Although the parties included the constitution of the Diocese of Colorado in the record, no part of this constitution was offered into evidence or discussed by the parties. Only article XVI appears to be of possible relevance, as it provides that "[a]ll real property of The Church" within the diocese not held by parishes and "all personal property of The Church" not held by parishes and missions "shall be Diocesan property." We deem this article of little significance for our purposes here, however, as it is ambiguous as regards the problem presented and neither the plaintiffs nor the defendants argue that it is relevant.

The canons of the diocese do contain various provisions of relevance. Canon 17 concerns the organization and governance of parishes. Section 3 of this canon requires that every parish adopt a resolution "acceding to the Constitution and Canons of The Church and to the Constitution and Canons of the Diocese of Colorado, and promising conformity to the Doctrine, Discipline and Worship of The Church." As noted above, St. Mary's placed such a provision in its articles of incorporation and in its bylaws. Section 8 further provides:

> No Parish shall file Articles of Incorporation as provided by the State of Colorado unless such Articles of Incorporation be in accord with and accede expressly to the Constitution and Canons adopted by The General Convention of The Church and to the Constitution and Canons of

> the Diocese of Colorado, and shall have received first the written approval of the Bishop and the Chancellor or Vice-Chancellor of the Diocese. No Parish shall amend its Articles of Incorporation without the written consent of the Bishop and the Chancellor or Vice-Chancellor of the Diocese.

Finally, Section 7 of the same canon relates directly to parish property, and provides:

> Every Parish shall have control of its own local affairs, but no Parish shall incur an indebtedness which may alienate or encumber Church property without the written consent of the Diocesan Executive Council, nor may it encumber nor alienate any consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service without additionally obtaining the consent of the Standing Committee of the Diocese.

The trial court found that when the parish sought to burden its real property in connection with construction loans or purchases of other property in 1956, 1963, 1973 and 1976, the parish submitted formal applications for consent to encumber to the Board of Trustees of the Diocese or to the Board's successor entity, the Diocesan Executive Council, "the tribunal having general charge of property and financial matters." In 1968, an encumbrance "may have been incurred" without a request for consent, "but this was apparently not done with any intent to defy or disobey the Diocese."

Next, canons 18 and 21, although not formally offered into evidence, are obviously relevant and were placed in the record by the parties. Canon 18 provides for the dissolution of parishes. Section 1 provides that "[w]hen a Parish has ceased to support its Rector," the Bishop may dissolve the parish. Section 2 provides that upon dissolution "the title to all of its property, both real and personal, shall vest automatically and forthwith in the Diocesan Cor-

poration known as The Bishop and Diocese of Colorado." Section 3 further provides that upon dissolution of a parish, the local corporation dissolves automatically. Obviously, a dissolution of St. Mary's parish has not taken place. This canon, however, does establish that the parish property is not intended by the general church to leave the diocese and that the general church has the authority to implement that intention. The canon is sufficient, in concert with the other provisions, to demonstrate the irrevocable nature of the dedication of property by the local church corporation for the purpose of advancing the work of PECUSA.

Diocesan canon 21 concerns the use of church buildings and provides:

> Church buildings, Chapels or houses of worship belonging to any Parish, Mission or Institution of the Church within the boundaries of the Diocese of Colorado may be opened for all Services, Rites, Ceremonies or other purposes authorized or sanctioned by The Church in the United States of America or by the Bishop Ordinary, and for none other purposes, at such times as the Priest in charge may deem proper or, if there be no Priest in charge, as the Bishop having jurisdiction may direct.

Again, this canon is another strong example of the control over property ceded by the local church to the diocese and is further indicative of the intent of the local and the general church to maintain integrity in the ownership and use of property at the parish level for PECUSA purposes. Furthermore, based on the testimony of the Bishop, the trial court found that, among other powers, the Bishop had the authority to visit congregations in the diocese for the purpose "of inspecting the behavior of their clergy and of examining their general physical and financial condition." The court also found that the defendants did not

contradict the Bishop's description "of the actual operation and exercise of authority within the Diocese . . . as to property and financial matters."

Finally, Section 1 of Canon 12 provides for the Diocesan Executive Council and generally outlines the council's duties and powers. Specifically relevant to this dispute is the council's duty to direct the "carrying out of the programs and policies for the Diocese as adopted by the Annual Diocesan Convention." This canon does not expressly authorize the council to control parish property or preclude the council from controlling parish property; it does appear to provide the council with general authority sufficient to administer parish property to the extent that control is authorized by other provisions or documents.

Little of relevance to this particular issue can be found in the Colorado statutes. A few states have statutes governing the holding of or control over real property formally held by a local church that is part of a hierarchical church. For example, *see Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 471 A.2d 1271, 1276-77, 1279 (Pa. Commw. 1984) (polity approach essentially codified in Pa. Act of 1935), *reversed*, 489 A.2d 1317 (Pa.), *cert. denied*, 106 S. Ct. 198 (1985). Colorado has no such statute.

Prior to 1968, Colorado statutes made explicit provision for the incorporation of religious societies, including churches. *See* §§ 7-50-101 to -114, 3 C.R.S. (1973 & 1985 Supp.). Nothing in article 50, or its predecessors, indicated who was to control church property in the event of a dispute between a local church and its general church. The provisions of article 50 do not apply to any religious society formed after December 31, 1967, or to any religious corporation formed prior to January 1, 1968, "which has elected to accept the provisions of articles 20 to 29 of this title [the Colorado Nonprofit Corporation Act]." § 7-50-101(2), 3 C.R.S. (1973). As noted in footnote 2 of this opinion, St. Mary's Church was incorporated prior to 1968

under the forerunner of article 50, but opted to be governed by the provisions of the Colorado Nonprofit Corporation Act, as permitted by section 7-50-101(2), on April 30, 1976. This was approximately six months before the local schism. Thus, the provisions of the Colorado Nonprofit Corporation Act governed the operations of St. Mary's Church at the time this dispute arose. Again, however, there is nothing in the Colorado Nonprofit Corporation Act that either requires the local corporation to hold its property in trust for the general church or prohibits such action, or that in any way provides support for or detracts from the plaintiffs' argument that the local church corporation, the legal title holder, does not control the local church property.

In summary, St. Mary's articles of incorporation and bylaws, along with relevant provisions in the canons of the general church, demonstrate a unity of purpose on the part of the parish and of the general church reflecting the intent that property held by the parish would be dedicated to and utilized for the advancement of the work of PECUSA. These provisions foreclose the possibility of the withdrawal of property from the parish simply because a majority of the members of the parish decide to end their association with PECUSA. We hold that the facts specifically found by the trial court or otherwise uncontroverted establish that a trust has been imposed upon the real and personal property of St. Mary's Church for the use of the general church.[16] There is no question but that the utili-

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[16] Our decision is in accord with the holding of the court of appeals in *St. Paul's Episcopal Church*, based upon nearly identical facts. We recognize that the decision of the court of appeals in *St. Paul's Episcopal Church* was not selected for official publication and, therefore, has no value as precedent in the courts of the state. *See* C.A.R. 35(f). However, the decisions of the court of appeals in *Mote* and *St. Paul's Episcopal Church*, decided within a two-year span, subjected PECUSA and its Colorado diocese to apparently inconsistent and conflicting decisions concerning rights in parish property. For that reason, we feel

zation of the property by those members of St. Mary's who desire to remain affiliated with PECUSA under diocesan direction is in furtherance of that use.

There has been only one other reported decision in which a neutral principles analysis was applied to resolve a similar church property dispute arising from a schism in a local PECUSA church, *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 171 Cal. Rptr. 541 (Cal. App.), *cert. denied*, 454 U.S. 864 (1981). In *Barker*, a panel of the California Court of Appeals concluded, after reviewing articles of incorporation and church canons, that a trust had not been imposed on the property of three different parishes for the benefit of the general church, and that no other principle of real property, contract or trust law operated to strip these local churches of control over the property to which they held legal title. 171 Cal. Rptr. at 552-55.

A fourth PECUSA parish, however, the Holy Apostles Church, was found to have imposed an express trust upon its property in favor of the general church. *Id.* at 554-55, 555-56. One distinction between the Holy Apostles Church and the other three found significant by the court was that the articles of incorporation of the Holy Apostles Church specified that upon dissolution, liquidation or abandonment of the local church, the local church property would inure to the benefit of a charitable fund operated by the diocese. *Id.* The statute under which the local church was organized as a subordinate body of the general church also provided that upon revocation of the local church charter by the general church the local church was to deliver its property to the general church. The California court held that the local church's disaffiliation and secession from the general church was the equivalent of a re-

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compelled to give due consideration to the holding and analysis in *St. Paul's Episcopal Church* as well as the holding and analysis in *Mote*, the case on review.

vocation of its charter, that the result was constructive dissolution of the local church, and that its property reverted to the general church under the provisions of the statute and the articles of incorporation of the local church. *Id.* at 556. In the present case, an analogous dissolution/reversion provision appears in canon 18 of the canons of the Diocese of Colorado. Although the articles of incorporation of St. Mary's Church do not expressly incorporate this canon, those articles do contain the general provision that St. Mary's accedes to the canons of the diocese. While we do not agree that the equivalent of dissolution has occurred when a local church attempts to disaffiliate, we do agree that this provision indicates the nature and extent of the control over real and personal property by the diocese and the intent of all concerned that the property remain within the diocese.[17]

On facts similar to those now before us, other courts have found a trust relationship or some other legal rela-

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[17] We recognize that a similar "dissolution" provision was in the Canons of the Diocese of Los Angeles at the time of the dispute in *Barker*, and that the three parishes (other than Holy Apostles Church) had provisions in their articles of incorporation acceding to the diocesan canons, 171 Cal. Rptr. at 544-46, yet the California Court of Appeals held that these provisions did not preclude these three parishes from disaffiliating and withdrawing their property from PECUSA, *id.* at 554-55. The court noted that at the time the articles of incorporation of the three parishes were adopted, the diocesan canons did *not* include the "dissolution" provision. *Id.* at 554. The court concluded that the general accession provisions were "nothing more than expressions of present intention" that were not intended to be open-ended agreements to accept all rules and regulations subsequently adopted by the general church, were not "restrictive of future amendments to the articles," and did not create an express trust over the property of the local church in favor of the general church. *Id.* On the record before us, including the fact that nothing in the record indicates that the canons of the Diocese of Colorado did not include the "dissolution" provision, Canon 18, when the articles of incorporation of St. Mary's were adopted in 1934 or amended in 1955, we find the holding in *Barker* inapplicable and decline to follow it.

tionship divesting the local church of control of its property based upon a neutral principles analysis. *Crumbley v. Solomon,* 254 S.E.2d 330 (Ga. 1979) (per curiam) (Holiness Baptist Association); *Carnes v. Smith,* 222 S.E.2d 322 (Ga.), *cert. denied,* 429 U.S. 868 (1976) (United Methodist Church); *United Methodist Church v. St. Louis Crossing Independent Methodist Church,* 276 N.E.2d 916 (Ind. App. 1971) (United Methodist Church); *Fonken v. Community Church of Kamrar,* 339 N.W.2d 810 (Iowa 1983) (Presbyterian Church—utilizing both a polity and a neutral principles analysis); *Fluker Community Church v. Hitchens,* 419 So.2d 445 (La. 1982) (African Methodist Episcopal Church); *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore,* 464 A.2d 1008 (Md. 1983), *cert. denied,* 104 S. Ct. 1287 (1984) (Presbyterian Church—utilizing both a polity and a neutral principles analysis); *Protestant Episcopal Church v. Graves,* 417 A.2d 19 (N.J. 1980), *cert. denied sub nom. Moore v. Protestant Episcopal Church,* 449 U.S. 1131 (1981) (PECUSA—utilizing a polity analysis but noting that a neutral principles analysis would produce the same result); *Fairmount Presbyterian Church, Inc. v. Presbytery of Holston,* 531 S.W.2d 301 (Tenn. App), *cert. denied* (Tenn. 1975) (Presbyterian Church). As well, other courts have applied a neutral principles analysis to more or less similar facts and have *not* found a trust relationship. *E.g., Presbytery of Riverside v. Community Church of Palm Springs,* 152 Cal. Reptr. 854 (Cal. App.), *cert. denied,* 444 U.S. 974 (1979) (Presbyterian Church); *Coles v. Wilburn,* 245 S.E.2d 273 (Ga. 1978) (per curiam) (Christian Methodist Episcopal Church); *York v. First Presbyterian Church of Anna,* 474 N.E.2d 716 (Ill. App. 1984), *cert. denied,* 106 S. Ct. 183 (1985) (Presbyterian Church); *Presbytery of Elijah Parish Lovejoy v. Jaeggi,* 682 S.W.2d 465 (Mo. 1984), *cert. denied,* 105 S. Ct. 2361 (1985) (Presbyterian Church); *First Presbyterian Church of Schenectady v. United Presbyterian Church,* 464 N.E.2d 454 (N.Y.), *cert. denied,* 105 S. Ct. 514 (1984) (Presbyterian Church); *Presbytery of Bea-*

ver-Butler v. Middlesex Presbyterian Church, 489 A.2d 1317 (Pa.) *cert denied*, 106 S. Ct. 198 (1985) (Presbyterian Church); *Foss v. Dykstra*, 342 N.W.2d 220 (S.D. 1983) (Presbyterian Church). Our review of these cases and of other of the myriad decisions from the courts of this nation involving church property disputes persuades us of the correctness of our conclusion that, on these particular facts, a trust has been imposed on the real and personal property held by St. Mary's Church for the use of the general church.[18]

IV.

We reverse the judgment of the court of appeals and remand this case to that court with directions to return it to the district court for entry of judgment in favor of the plaintiffs consistent with the views expressed in this opinion and for a determination of any further relief that may be appropriate.

JUSTICE KIRSHBAUM does not participate.

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[18] In their petition for certiorari, the plaintiffs argued that the adoption of the neutral principles analysis by the court of appeals and the application of that analysis to find the control over the church property to be in the secessionist majority constituted an unconstitutional retroactive application of new law that deprived the plaintiffs of their established property rights. We granted certiorari to review that issue. However, because of our resolution of the case, we find it unnecessary to address the retroactivity question as the plaintiffs are no longer adversely affected by the application of the neutral principles analysis.

APPENDIX D

SUPREME COURT, STATE OF COLORADO

Case No. 83SC104

Certiorari to the Colorado Court of Appeals

ORDER OF COURT

THE BISHOP AND DIOCESE OF COLORADO, a Colorado non-profit corporation, THE REVEREND CHARLES LARRY DAY, ALLEN UYEDA, ROBERT DOUGLASS, H. DAVID HUSKIN, HARRY THOM, JOHN BROWN, JOSEPH ESCH, CARLA PARNELL, MILDRED MULLENAX, JOHN HELMORE, OTIS DRURY, MARIAN LATTIMORE, as members of the Vestry of the Episcopal Parish of St. Mary's; the EPISCOPAL PARISH OF ST. MARY'S; and EPISCOPAL CHURCH OF ST. MARY,

Petitioners,

vs.

THE REVEREND JAMES O. MOTE, JOHN ARCHIBOLD, MARVIN OLSEN, JOHN BRAINERD, WAYNE GILL, CHRIS WOODBURY, RICHARD ATCHISON, CHARLES BUELL, RICH HILL, WALTER KULP, JAMES LUCERO, LORNE SCOFIELD, and SAINT MARY'S CHURCH, a Colorado non-profit corporation,

Respondents.

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions for Rehearing shall be, and the same hereby are, denied.

BY THE COURT, EN BANC, FEBRUARY 24, 1986.
JUSTICE KIRSHBAUM does not participate.

cc: MILES M. GERSH, Esq.
1900 Grant Street, Suite 1120
Denver, CO 80203

FORREST C. O'DELL, Esq.
950 S. Cherry Street, Suite 1112
Denver, CO 80222

JOHN E. ARCHIBOLD
700 Lafayette Street
Denver, CO 80218

APPENDIX E

SUPREME COURT, STATE OF COLORADO

Case No. 83 SC 104

CERTIORARI TO THE COLORADO COURT OF APPEALS, NO. 80CA0406

ORDER OF COURT

THE BISHOP AND DIOCESE OF COLORADO, et al,
Petitioners,

v.

THE REVEREND JAMES O. MOTE, et al.,
Respondents.

Upon consideration of the Motion for Stay of Mandate filed by Respondents herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Granted, and issuance of the Mandate is hereby Stayed for thirty (30) days from this date. All further Stays must be sought, if at all, from the United States Supreme Court.

BY THE COURT, FEBRUARY 28, 1986

cc: FORREST C. O'DELL
1112 Cherry Tower
950 So. Cherry Street
Denver, CO 80222

JOHN ARCHIBOLD
700 Lafayette Street

Denver, CO 80218

MILES M. GERSH
1900 Grant St., #1120
Denver, CO 80203

GARY A. SONKE, Clerk
Colorado Court of Appeals

APPENDIX F

ARTICLES OF INCORPORATION OF SAINT MARY'S CHURCH (a COLORADO CORPORATION) *(as amended May 1955)*

Clause 1. The objects and purposes for which said Parish is incorporated are to administer the temporalities of the Protestant Episcopal Church in the Parish and to carry on and conduct religious, educational and benevolent institutions and work; to acquire by lease, purchase, gift or otherwise, hold, use and enjoy, let, sell, mortgage, convey or otherwise dispose of, any and all real estate and personal property as may be determined by said corporation to be beneficial or useful in carrying out said purposes, and particularly to acquire, hold, use and enjoy all of the property now held for the members of said Church in the City and County of Denver, and State of Colorado; and the said corporation, acting through its said Wardens and Vestrymen, shall have power and authority to borrow money and to pledge its franchise and property, both ral [sic] and personal, to secure the payment thereof, and said Wardens and Vestrymen may have and exercise all the powers necessary and requisite to carry into affect the objects for which said corporation is formed; provided, however, the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado, a corporation, expressed by resolution of its Board of Trustee.

Clause 2. The corporation now in existence by its Charter as herein amended does hereby expressly accede to all the provisions of the constitution and canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the constitution and canons of the Diocese of Colorado.

* * *

BY-LAWS OF SAINT MARY'S CHURCH
(a COLORADO CORPORATION)

* * *

ARTICLE II—ACESSION

The Church and Parish accede to the Constitution and Canons of The Protestant Episcopal Church in The United States of America, and the Ecclesiastical Authority and Canons of the Diocese of Colorado.
The parish shall have control of its own local affairs but nothing shall be done which conflicts with the Canons of the Church, either General or Diocesan.

The governing authority of the Corporation shall consist of the Rector of the Parish as president, a Senior warden, a Junior warden, and nine Vestrymen acting as a Board of Trustee.

* * *

CANONS OF THE DIOCESE OF COLORADO

* * *

CANON 12

Section 1. There shall be a Diocesan Executive Council, whose duty it shall be to plan, provide funds for and direct the carrying out of the programs and policies for the Diocese as adopted by the Annual Diocesan Convention. The Diocesan Executive Council shall have charge of the unification, development and prosecution of the missionary, educational and social work of the Diocese, and of such other work as may be delegated to it by the Diocesan Convention and the Constitution and Canons of the Diocese of Colorado, or which it may assume upon the recommendation of the national Executive Council of the Episcopal Church.

* * *

CANON 17

Section 3. Every Parish so organized shall present to the Secretary of Diocesan Convention a Certificate of Organization, signed by the Bishop, together with a resolution adopted by said Parish acceding to the Constitution and Canons of The Church and to the Constitution and Canons of the Diocese of Colorado, and promising conformity to the Doctrine, Discipline and Worship of The Church.

* * *

Section 7. Every Parish shall have control of its own local affairs, but no Parish shall incur an indebtedness which may alienate or encumber Church property without the written consent of the Diocesan Executive Council, nor may it encumber nor alienate any consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service without additionally obtaining the consent of the Standing Committee of the Diocese.

Section 8. No Parish shall file Articles of Incorporation as provided by the State of Colorado unless such Articles of Incorporation be in accord with and accede expressly to the Constitution and Canons adopted by The General Convention of The Church and to the Constitution and Canons of the Diocese of Colorado, and shall have received first the written approval of the Bishop and the Chancellor or Vice-Chancellor of the Diocese. No Parish shall amend its Articles of Incorporation without the written consent of the Bishop and the Chancellor or Vice-Chancellor of the Diocese.

* * *

CANON 18

Section 1. When a Parish has ceased to support its Rector the Bishop, with the advice and consent of the Standing Committee, may dissolve the parochial organization thereof. Upon such dissolution, the Bishop may organize the defunct Parish as a Mission or leave it unorganized.

Section 2. From the time of dissolution of a Parish, the title to all of its property, both real and personal, shall vest automatically and forthwith in the Diocesan Corporation known as The Bishop and Diocese of Colorado.

Section 3. The dissolution of a Parish shall dissolve automatically and forthwith any parochial corporation which may have been chartered therein by the State of Colorado.

* * *

CANON 21

Church buildings, Chapels or house of worship belonging to any Parish, Mission or Institution of the Church within the boundaries of the Diocese of Colorado may be opened for all Services, Rites, Ceremonies or other purposes authorized or sanctioned by The Church in the United States of America or by the Bishop Ordinary, and for none other purposes, at such times as the Priest in charge may deem

proper or, if there be no Priest in charge, as the Bishop having jurisdiction may direct.

* * *

CANONS FOR THE GOVERNMENT OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

* * *

TITLE I

* * *

CANON 6

Section 4. All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons.

(***as amended September 1979***)

* * *

CANON 12

Section 1. Every Congregation of this Church shall belong to the Church in the Diocese in which its place of worship is situated; and no Minister having a Parish or Cure in more than one jurisdiction shall have a seat in the Convention of any jurisdiction other than that in which he has canonical residence.

Section 2 (a). The ascertainment and defining of the boundaries of existing Parishes or Parochial Cures, as well as the establishment of a new Parish or Congregation, and the formation of a new Parish within the limits of any other Parish, is left to the action of the several Diocesan Conventions.

(b). Until a Canon or other regulation of a Diocesan Convention shall have been adopted, the formation of new Parishes, or the establishment of new Parishes or Congregations within the limits of existing Parishes, shall be vested in the Bishop of the Diocese, acting by and with the advice and consent of the Standing Committee thereof, and, in case of there being no Bishop, in the Ecclesiastical Authority.

Section 3 (a). Where Parish boundaries are not defined by law, or settled by Diocesan Authority under Section 2 of this Canon, or are not otherwise settled, they shall be defined by the civil divisions of the State as follows:

Parochial boundaries shall be the limits as fixed by law, of a village, town, township, incorporated borough, city, or of some division of any such civil district, which may be recognized by the Bishop, acting with the advice and consent of the Standing Committee, as constituting the boundaries of a Parish.

(b). If there be but one Church or Congregation within the limits of such village, town, township, borough, city, or such division of a civil district, as herein provided, the same shall be deemed the Parochial Cure of the Minister having charge thereof. If there be two or more Churches or Congregations therein, it shall be deemed the Cure of the Ministers thereof.

(c). The Canon shall not affect the legal rights of property of any Parish or Congregation.

* * *

TITLE II

* * *

CANON 7

Section 2. No dedicated and consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of

for any worldly or common use, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

* * *

APPENDIX G

REPORT OF THE EXCERPTS OF THE ANNUAL BOARD OF TRUSTEES, THE DIOCESE OF COLORADO, AND THE BISHOP AND DIOCESE OF COLORADO, 1952–1953

(Defendants' Exhibit 14, Folio 1606)

* * *

In the consideration of such items as the above, the Board devoted a good deal of time, in consultation with the Vice-Chancellor, to the preparation of standard forms to be used by parishes and missions making application for loans from Diocesan funds, or for permission to negotiate loans involving the possible encumbering of church property. The purpose of these forms is to protect the properties of parishes and missions, and also to implement the Canonical responsibilities of the Trustees. Consequently, the following preamble, adopted by the Board, was made part of the application blanks:

"The General Canons of the Church prohibit the alienation of consecrated property. Sec. 9, Canon IX, of the Canons of the Diocese of Colorado, provides that no parish shall incur indebtedness which may alienate or encumber church property without the consent in writing of The Diocese of Colorado, expressed by resolution of its Board of Trustees. The purpose of the within form is to facilitate and in some instances to obviate the obtaining by parishes and missions of this consent.

"The Board of Trustees of The Diocese of Colorado desires to avoid interfering in the internal affairs of any parish to any greater extent than this Canon requires. On the other hand, it is possible that a judgment creditor of a mission or parish might seek to attach consecrated church property in satisfaction of his judgment, even though such

property were not expressly given as security, and under certain circumstances succeed in this effort. Further, the Board of Trustees under the above-mentioned Canon has an obligation to make certain that no indebtedness is incurred by a parish or mission under circumstances that may impose a moral obligation on the Diocese where none is intended.

* * *

APPENDIX H

EXCERPTS OF OFFICIAL JOURNALS OF THE ANNUAL CONVENTIONS OF THE DIOCESE OF COLORADO (Plaintiffs' Exhibit L, Folio 1577)

Official Journal of the Annual Convention of the Diocese of Colorado, October 27-28, 1972.

* * *

VII. Proposed by The Reverend Edwin H. Walker, IV: [St. Mary's]

WHEREAS: The Anglican-Roman Catholic Commission has reached an agreement as to the nature and understanding of the Holy Eucharist in Catholic worship, and

WHEREAS: The Protestant Episcopal Church of the U.S.A. authorized the use of two trial rites for public worship at the General Convention in 1971, and

WHEREAS: The Roman Communion has authorized the use of four Canons in the new Roman Rite, and

WHEREAS: The Protestant Episcopal Church in the U.S.A. at the General Convention in 1970 approved the Report of the Anglican-Roman Catholic Commission which recognized the desirability of intercommunion between Anglican and Roman Catholics and eventual organic reunion of the two Communions, and

WHEREAS: The attainment of the aforesaid goals will be hastened by the familiarity of Anglicans with the various approved new rites of our Roman brethren.

BE IT THEREFORE RESOLVED: That the Diocese of Colorado memoralize the General Convention of the Protestant Episcopal Church of the U.S.A. to authorize the

use of the four Canons of the New Roman Rite in the trial rite services of Holy Communion of the Protestant Episcopal Church.

This resolution was seconded, debated, and then defeated.

IV. Proposed by the Clergy and Vestry of Saint Mary's Church:

WHEREAS: The 85th Convention of the Diocese of Colorado adopted a resolution to memoralize the General Convention of the Protestant Episcopal Church in the U.S.A. to canonically provide for the dissolution of moribund marriage and,

WHEREAS: Said resolution was adopted without sufficient consideration of its theological, moral, societal, and practical implications and effects, and

WHEREAS: Said resolution asks that General Convention of the Protestant Episcopal Church in the U.S.A. canonically provide for the dissolution of marriages which, upon the clear and undoubted authority of our Lord Jesus Christ, are indissoluble, and

WHEREAS: The adoption of the said resolution weakens, rather than strengthens, the fibre of family life not only in our Diocese but also in the community at large, and

WHEREAS: The Church's obligation to her Lord and His people is to set forth and sustain a clear standard for the rights and responsibilities of marriage consistent with compassion, truth, and love.

BE IT THEREFORE RESOLVED: That the Diocese of Colorado rescind Resolution No. VI adopted by the Diocese of Colorado at its convention held in Grand Junction, Colorado on November 7, 1971, and November 8, 1971,

BE IT FURTHER RESOLVED: That the Diocese of Colorado memorialize the General Convention of the Prot-

estant Episcopal Church of the U.S.A. that it continue to uphold the dignity and sanctity of marriage, and the joys' and responsibilities of marriage, by steadfast adherence to the present canons concerning marriage.

* * *

VI. Proposed by the Clergy and Vestry of Saint Mary's Church:

WHEREAS: The *New American Bible* is a current translation of the Holy Scriptures of superior academic quality, trustworthiness, and readability, and

WHEREAS: The Protestant Episcopal Church of the U.S.A. has heretofore authorized the use of the Revised Standard Version, the New English Bible, and the Jerusalem Bible in her canonical services, and

WHEREAS: The use of the *New American Bible* will enrich our understanding of the Sacred Scriptures,

BE IT THEREFORE RESOLVED: That the Diocese of Colorado memorialize the General Convention of the Protestant Episcopal Church of the U.S.A. to authorize the use of the *New American Bible* in her canonical services.

Moved, seconded, and passed by Convention.

* * *

Official Journal of the Annual Convention of the Diocese of Colorado, November 7-9, 1974.

V. Proposed by the Vestry of St. Mary's Church, Denver:

WHEREAS: The Church, which is the body of Christ, has proclaimed from earliest times the unconditional love of God (agape love) toward every human person, and

WHEREAS: A new "ethic" profoundly opposed to the Judeo-Christian tradition seeks to place relative rather than

absolute values on human lives under the euphemism of the "sound importance of the quality of life" and

WHEREAS: The Church has sought, and should continue to seek, the protection of the innocent, the impoverished and the outcast, in obedience to our Lord's command to love our neighbors, and

WHEREAS: The practice of abortion, euthanasia, and discrimination, although allegedly justified on grounds of compelling social necessity, in fact result in the brutalization and destruction of innocent human lives, and

WHEREAS: It is not only the right, and also the solemn obligation and duty of Christians, individually and corporately, to work for the advancement of justice in the civil order,

THEREFORE, BE IT NOW RESOLVED: The the Diocese of Colorado of the Protestant Episcopal Church of the United States of America opposes and condemns the practice of abortion, euthanasia, discrimination and selective capital punishment as destructive of human personhood, loved and redeemed by our Lord Jesus Christ, and

BE IT NOW FURTHER RESOLVED: That the Diocese of Colorado of the Protestant Episcopal Church of the United States of America endorses the adoption of an amendment to the Constitution of the United States clearly protective of the civil and fundamental rights of all innocent human person, born and unborn, irrespective of age, race, or economic or physical condition. . . .

* * *

The Reverend Robert J. Babb moved that this resolution be divided and represented as four resolutions, one each on the topics of "Abortion," "Euthanasia," "Discrimination," and "Selective Capital Punishment." This motion was seconded and adopted by the Convention and the fol-

lowing resolutions as well as the actions taken reflect this will of the Convention:

A. "WHEREAS: The Church, which is the body of Christ, has proclaimed from earliest times the unconditional love of God toward every human, and

"WHEREAS: The church has sought, and continues to seek, the protection of all humans including the innocent, the impoverished and the outcast, in obedience to our Lord's command to love our neighbors;

"THEREFORE BE IT RESOLVED: The the 88th Convention of the Diocese of Colorado of the Protestant Episcopal Church of the United States of America, opposes and condemns the practice of abortion.

"BE IT FURTHER RESOLVED: That the Diocese of Colorado of the Protestant Episcopal Church of the United States of America, endorses the adoption of an amendment to the Constitution of the United States clearly protective of the civil and fundamental rights of all humans, born and unborn, irrespective of age, race, economic status or physical condition, and

"BE IT FURTHER RESOLVED: That the Secretary of the Diocese of Colorado of the Protestant Episcopal Church, USA, send copies of this Resolution to each United States Senator and Representative from Colorado to the 94th Congress, and to each member of the 49th General Assembly of the State of Colordao."

This motion was seconded but defeated by the Convention.

* * *

VII. Proposed by the Vestry of St. Mary's Church, Denver:

WHEREAS: From her inception, the Church, which is the body of our Lord Jesus Christ, has been enriched by

the varied ministries of her sons and daughters in service to Christ and to the humanity for whom He died, and

WHEREAS: Obedience to the faith once delivered unto the saints is the hallmark of true service, and

WHEREAS: Priests, in service to God and His people, represent Christ, the Bridegroom of the Church which is His Bride, the normality of priesthood is male as is clearly and unequivocally evident by the sovereign choice of Christ Himself of a male apostolate, and the unbroken history of the Church Universal in ordaining only men to the sacred priesthood, and

WHEREAS: The action of four bishops in purporting to "ordain" eleven deaconnesses of the Protestant Episcopal Church to the sacred order of the priesthood not only was done in contradiction to the historical tradition of the Church Universal, but in singular defiance of the constitution and canons of the Protestant Episcopal Church, USA, and in total disregard of the specific request of the Prayer Book not to so "ordain", and

WHEREAS: The fabric of the Church, and it should be emphasized, society as well, is torn asunder by those whose actions purport to place themselves above or outside the law, and

WHEREAS: The sickness of the Church can only be accentuated by the parallel disease of defiance at worst and disregard at best, of the traditions and laws of the Church, and more particularly that branch of the Church made up of the Protestant Episcopal Church of the USA.

BE IT THEREFORE RESOLVED: That the 1974 Annual Convention of the Diocese of Colorado reaffirm its adherence to the traditions of the Church Universal and the Constitution and Canons of the Protestant Episcopal Church, and more particularly as the same relate to the requirement that the priesthood be male, and

BE IT THEREFORE FURTHER RESOLVED: That the 1974 Annual Convention of the Diocese of Colorado urge our appropriate sister Dioceses to initiate the enforcement of the Constitution and Canons of the Protestant Episcopal Church with respect to those bishops and deaconesses whose actions in July of 1974 with respect to the purported ordination of women to the sacred order of the priesthood were taken in defiance and disregard thereof.

This resolution was tabled.

* * *

X. Proposed by the Vestry of St. Mary's Church:

WHEREAS: Neither the Church Universal, nor any of its constituent parts such as the Protestant Episcopal Church in the United States of America, is at liberty to disobey and disregard the commandments of our Lord Jesus Christ, however superficially relevant to the "needs of the age" such disobedience and disregard may be, and,

WHEREAS: The Protestant Episcopal Church in the United States of America, in disobedience and disregard to the teaching and commandments of our Lord Jesus Christ, purported to invest her Bishops with authority to permit the so-called "remarriage" of a person validly married whose spouse has not died, which authority even our Lord Jesus Christ did not claim for Himself, and

WHEREAS: Disobedience to Christ in this regard has the three-fold and deleterious effect of discrediting the Church, weakening the ties and strength of homes and families, and tearing asunder the fabric of society,

THEREFORE BE IT RESOLVED: That the 1974 Convention of the Diocese of Colorado memorialize the next General Convention of the Protestant Episcopal Church of the United States of America to amend Canon 18 Section 2 of the present marriage canon and unequivocally to reaffirm its obedience to the Lord Jesus Christ who declared

"Those whom God hath joined together let no man put asunder."

Did not pass.

* * *

Official Journal of the Annual Convention of the Diocese of Colorado, November 6–8, 1975.

* * *

III. Proposed by Mr. Joseph L. Frascona [registered delegate from St. Mary's parish]

BE IT RESOLVED: That the following Resolution be approved by this, the Eighty-Ninth Annual Convention of the Diocese of Colorado, and that it be submitted to the Sixty-Fifth General Convention of the Protestant Episcopal Church in the United States of America:

"BE IT RESOLVED: Solely in accordance with our historical religious belief, we reaffirm that only males may be ordered Priest or Bishop of the Protestant Episcopal Church in the United States of America."

This motion to amend by substitution was seconded and passed.

Mr. Ralph Crandell, Church of the Ascension, Denver, moved that in the second line of the resolution the words "It is the present majority view of this Convention that. . . ." so that the phrase would read: ". . . .we reaffirm that it is the present majority view of this Convention that only males, etc. . . ." This amendment was seconded but did not pass.

The Reverend Gilbert A. Dahlberg, Rector of St. Barnabas, Denver, moved to table this resolution. It was seconded, but did not pass.

A request for a vote by orders was received at this time and the Memorial Resolution was passed in both orders.

By this action Memorial Resolution V was defeated:

* * *

VI. Proposed by Mr. John Brainerd [registered delegate from St. Mary's parish]

WHEREAS: The One, Holy, Catholic and Apostolic Church, of which the Protestant Episcopal Church in the United States of America is a part, has believed in the indelibility of the sacrament of Holy Confirmation which is ministered only by a bishop in apostolic succession,

THEREFORE, BE IT RESOLVED: That the Diocese of Colorado memorialize the General Convention of the Protestant Episcopal Church in the United States of America to reaffirm its belief in Holy Confirmation as an indelible sacrament of the church and the practice of that said sacrament is to be ministered only by a bishop in apostolic succession.

This Memorial Resolution was also seconded and passed by the Convention.

* * *

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2093

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE REVEREND JAMES O. MOTE, *et al.*,

Petitioners,

v.

THE BISHOP AND DIOCESE OF COLORADO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

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July 28, 1986

QUESTION PRESENTED

Whether in holding that the secessionist majority of a local parish of the Episcopal Church was not entitled also to withdraw the local church's property, the Colorado Supreme Court acted in accordance with the First Amendment and with Jones v. Wolf, where the Colorado Supreme Court:

> (1) adopted and applied the neutral principles of law doctrine approved in *Jones v. Wolf*; and
>
> (2) applied specifically the principles of Colorado trust law, based on detailed and undisputed factual findings.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

This case arose in the Fall of 1976, when a dissident majority of the members of St. Mary's Church, Denver, seceded from the general or parent church with which St. Mary's had been affiliated for almost 45 years, the Protestant Episcopal Church in the United States of America (known generally and referred to herein as "the Episcopal Church," or as "PECUSA," or the "parent church"). The issue in the courts below was whether the withdrawing majority was entitled also to withdraw the church property, or whether rightful control of that property was instead vested in the Episcopal Church or in the minority of the St. Mary's

parishioners who had remained within the Episcopal Church. The petitioners, who are representatives of the secessionist majority, argued below that this issue of control should be decided under "neutral principles" of state corporate and property law. The Colorado Supreme Court did so, applying Colorado trust law to conclude that a trust had been imposed on the property of St. Mary's Church for the use of the Episcopal Church. (Pet. App. 83a).

All of the courts below based their legal conclusions on undisputed facts. The original incorporators of St. Mary's Church had specified in their Affidavit of Incorporation that they had "unanimously decided to organize as a Protestant Episcopal Church under the Diocese of Colorado . . ." (Pet. App. 37a). The Diocese of Colorado is a subordinate unit of PECUSA and is presided over by a Bishop, who is both its chief ecclesiastical authority and the chief executive officer of its corporate entity. The Diocese has a legislative and policy making body known as the Annual Convention and an executive body, the Diocesan Executive Council, which has the responsibility to carry out the policies and programs of the Annual Convention and has broad responsibility over financial and property matters in the Diocese. (Pet. App. 38a).

In 1954, the membership of St. Mary's Church, which began as a small Episcopal "mission," formally applied for parish status. In doing so, St. Mary's unanimously adopted a resolution acceding to the Constitutions both of the national church and of the Diocese, recognizing the authority of PECUSA, and promising obedience to the canons of PECUSA and the Diocese. (Pet. App. 38a). In its corporate bylaws also adopted in 1954, St. Mary's declared that "'nothing shall be done which conflicts with the canons of the Church, either General or Diocesan." (Pet.-App. 39a). The Diocesan canons provided, among other things, that church buildings could be opened only for purposes authorized by the Bishop and by the Episcopal Church and for no other purposes. (Pet. App. 17a).

In 1955, the year after it became a parish, St. Mary's requested and received the required consent of the Diocese to revise completely its own Articles of Incorporation. The revised articles contain specific provisions acceding to the laws of the Diocese and of PECUSA. The amended articles state, among other things, that "the objects and purposes for which said parish is incorporated are to administer the temporalities [i.e. properties and revenues] of the Protestant Episcopal Church in the parish," and that "the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado . . ." (Pet. App. 7a, 38a). Thereafter, when St. Mary's burdened its real property in connection with construction loans or purchases of other property, it submitted to the Diocese formal applications for consent to encumber. (Pet. App. 8a).

In September of 1976, the Episcopal Church approved the ordination of women to the priesthood. (Pet. App. 39a). Two months later, at the Annual Convention of the Diocese of Colorado, a majority of the members of the St. Mary's delegation walked out when the Convention rejected the delegation's resolution protesting the ordination of women and other actions taken by PECUSA. *(ibid.)*

On November 28, 1976, at a meeting at St. Mary's, the members voted 197 to 79 to withdraw from PECUSA and to amend the St. Mary's Articles of Incorporation by deleting all provisions recognizing the authority of PECUSA and of the Diocese. *(ibid.)* The Bishop of the Diocese of Colorado attempted to attend this meeting, but was physically barred at St. Mary's by members of the dissident group. Afterwards, the secessionist majority changed the locks on the doors of the church and posted off-duty Denver policemen as guards. (Pet. App. 10a).

When the withdrawing majority then refused requests and demands to surrender possession of the property, the Diocese and the group of St. Mary's parishioners who had chosen to remain within PECUSA filed suit in Denver District Court. They sought recovery of possession of the property of St. Mary's held by the secessionists. In the trial court, respondents presented evidence

and argued legal theories both of the "polity" doctrine and under Colorado trust and contract law. (Pet. App. 68a). The trial court chose to apply the "polity" analysis, enforcing the prior determination by the appropriate governing body of the Episcopal Church recognizing the loyal minority as the group entitled to control and possession of the property held by St. Mary's. (Pet.-App. 41a-42a).

The trial court's factual findings (Pet. App. 3a-21a) also set forth concretely the "detailed and largely undisputed facts of the history of the role played by St. Mary's Church and its members in the Diocese from the time of the founding of St. Mary's as a mission in the early 1930's until the time of the dispute which gave rise to this litigation." (Pet. App. 18a). Based on all the evidence presented, the trial court concluded, and found as a fact, that in the Diocese of Colorado, "[a]lienation, encumbrance and use of the property of an incorporated parish are not committed to the independent control of the parish." (Pet. App.14a). The trial court then entered judgment granting control of the property to the loyal minority of St. Mary's.

The Colorado Court of Appeals reversed, after adopting a "presumptive rule of majority representation," by which it examined the record only to determine whether an express trust over the property held by St. Mary's Church had been created in favor of the general church. (Pet. App. 42a).

The Colorado Supreme Court granted certiorari. That Court agreed with the Court of Appeals that there should be applied to church property disputes in Colorado the neutral principles approach of *Jones v. Wolf*.[1] The Court declined, however, to adopt a "presumptive rule of majority representation," such as had been implemented by the Georgia Supreme Court in *Jones*. Rather, the Colorado Supreme Court looked to "established principles of statutory and common law traditionally applied to determine who has legal control over any particular corporation

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[1]443 U.S. 595 (1979), *on remand*, 244 Ga. 388, 260 S.E. 2d 84, *cert. denied*, 444 U.S. 1080 (1980).

or voluntary association and how freely or extensively that control can be exercised." (Pet. App. 62a). The Colorado Supreme Court then held that under Colorado trust law, no particular language need be used to create a trust or to manifest the intention to create a trust, and that therefore there was no need under Colorado law to restrict the inquiry to a search for explicit language of express trust. (Pet. App. 63a-64a). The Colorado Supreme Court reviewed the undisputed facts of record and concluded in a unanimous opinion[2] that "on these particular facts, a trust has been imposed on the real and personal property held by St. Mary's Church for the use of the general church." (Pet. App. 83a).

Petitioners filed a petition for rehearing in the Colorado Supreme Court, urging among other things that the Court's holding was inconsistent with prior Colorado trust law. On February 24, 1986, the petition for rehearing was denied, without dissent. (Pet. App. 84a).

ARGUMENT

I. NO NOVEL OR SUBSTANTIAL QUESTION DISTINGUISHES THIS CASE, WHICH FALLS SQUARELY WITHIN THE PRINCIPLES ESTABLISHED BY THIS COURT IN *JONES V. WOLF*

In *Jones v. Wolf*, this Court reaffirmed "neutral principles of law" as an appropriate method for resolving church property disputes. The Court emphasized that this approach was consistent with First Amendment constraints prohibiting civil courts "from resolving church property disputes on the basis of religious doctrine and practice," while accomodating also the important principle that the First Amendment "does not dictate that a state

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[2]Justice Kirshbaum, who had been a member of the panel of the Colorado Court of Appeals when the lawsuit was before that Court, did not participate.

must follow a particular method of resolving church property disputes." 443 U.S. at 603. The Court quoted with approval the statement of Justice Brennan in the *Sharpsburg* case that a "state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[3]

In resolving the dispute over the church property at St. Mary's, the Colorado Supreme Court adopted and applied the neutral principles analysis, within the specific framework of relevant Colorado law. (Pet. App. 55a, 60a-67a). In Part I of their Brief, however, petitioners contend that review should be granted in this case because, allegedly, the Colorado Supreme Court "misapplied" the neutral principles analysis. (Pet. 11). The sole contention advanced by petitioners in support of this proposition is that under *Jones v. Wolf*, in resolving a church property dispute a state court purportedly should be forbidden to accord significance to any evidence or question other than whether "language of trust and property law familiar to lawyers and judges . . . clearly reflected an intent of the parties to create a trust over local church property in the event of the local church's disaffiliation from the denomination." (Pet. 18-19). This contention misconstrues both *Jones v. Wolf* and the opinion of the Colorado Supreme Court. The rule it advocates would implicate new and more difficult problems in the quest for constitutional neutrality in church property law.

In the first place, the rule that petitioners would propose effectively abandons the key principle of flexibility which was reaffirmed in *Jones v. Wolf*. The Court there stressed that the "primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accomodate all forms of religious organization and polity." 443

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[3]*Maryland & Virginia Eldership of the Church of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis in original).

U.S. at 604. The Court observed also that the neutral principles doctrine "shares the peculiar genius of private law systems in general — flexibility in ordering private rights and obligations to reflect the intentions of the parties." *(ibid.)*

The Court had before it in *Jones v. Wolf*, a particular version of the neutral principles analysis which had evolved in Georgia, and which in that State required a civil court as one part of resolving church property disputes to examine certain documents for language of trust in favor of the general church. 443 U.S. at 605. The Court nowhere held that it would be appropriate or even constitutionally permissible either to require every state to adopt Georgia's approach or to restrict the analysis in every church property dispute to a search for language of express trust directed to the contingency of disaffiliation. On the contrary, as desribed in *Jones v. Wolf*, "neutral principles" is a comprehensive doctrine which mandates no specific rule or formula, but rather commends the resolution of church property disputes through objective, well established principles of secular law, including principles of contract, corporate and property law. 443 U.S. at 603.

By contrast, the rule which petitioners advocate would arbitrarily preclude recourse to any other relevant neutral principle from the law of property, contracts or corporations. Petitioners maintain that their approach is needed in order to prevent state courts from somehow manipulating *Jones v. Wolf* in the service of "their particular view of church doctrine." (Pet. App. 2a). Petitioners cite no instance, however, where this has actually happened. Moreover, petitioners never attempt to explain by what reliable criteria appellate courts could be expected to decide whether the "language of trust and property law" in any particular case is sufficiently "familiar" to lawyers and judges. Nor do petitioners attempt to justify, under the First Amendment principles reviewed in *Jones v. Wolf*, a test that would erase from the analytic framework for church property disputes most of the doctrines and sources of relevant law regularly available to civil courts in controversies involving the property of secular entities.

In addition to failing to show why neutral principles under *Jones v. Wolf* ought now to be narrowed or redefined, petitioners also fail to demonstrate that the Colorado Supreme Court actually "ventured into the forbidden area of church polity and practice." (Pet. 15). The *facts* which the Colorado Supreme Court relied upon in applying Colorado trust law were undisputed facts, either as found by the trial court or as stipulated to by the parties. (Pet.-App. 37a). The trial court, for example, found *as a fact* that:

> "Alienation, encumbrance and use of the property of an incorporated parish [in the Diocese of Colorado] are not committed to the independent control of the parish."

(Pet. App. 14a).

The key provisions in the relevant documentary evidence, which petitioners now purport to find unacceptably "ecclesiastical," were not the subject of any conflict, let alone any doctrinal conflict, as to their meaning. As the trial court observed: "*It is undisputed* that these documents contain provisions which affect the right of ownership and use of church property. . . . *No dispute has arisen* in this case as to the meaning of these provisions; nor would the Court in any event resolve such a dispute." (Pet. App. 17a; emphasis supplied).

Nor do the selected facts or items of trial evidence highlighted by petitioners (Pet. 11-13) actually reflect any transgression by the Colorado Supreme Court into constitutionally "forbidden" areas. The first four of these items required neither consideration of religious precepts nor resolution of doctrinal issues (undisputed and uncontradicted evidence in the St. Mary's Articles of Incorporation and by-laws regarding promises of accession by the local church to the laws of the parent church; undisputed acknowledgement by St. Mary's of its status as a local unit with the national church; express acknowledgement by the St. Mary's Church corporation that St. Mary's could do nothing which would conflict with the laws of the parent church; and uncontested evidence as to the historical role of St. Mary's Church in the Diocese of Colorado)

Petitioners also suggest that the Colorado Supreme Court was improperly influenced by "doctrine" when it took into account the fact that the St. Mary's Church Articles of Incorporation provided that St. Mary's was incorporated in order to administer the real property of the parent church, including the real property titled in St. Mary's Church. (Pet. App. 71a). In the courts below, however, there was not any controversy as to the meaning of that provision. Petitioners now attempt to describe this provision as if it concerned only such property as was used "to carry on religious work." (Pet. 12). That limitation is not imposed by the Articles of Incorporation, and it has not previously been asserted by petitioners. (Pet. App. 88a). If anything, therefore, this is an example not of religious "entanglement" in the opinion or analysis of the Colorado Supreme Court, but of a recent confusion or misreading of the evidence by petitioners.

Similarly, petitioners now maintain that the Colorado Supreme Court improperly took into account a Diocesan canon related to control over church buildings. (Pet. 12). Petitioners say that such buildings could be opened "only for services, rites and ceremonies as are authorized or sanctioned by PECUSA or the Bishop Ordinary." *(ibid.)* This description does indeed make it appear as if the provision applied strictly to religious or "ecclesiastical" uses of the church property. The actual language of the provision cited by the Colorado Supreme Court states comprehensively, however, that church buildings may be opened for "all services, rites, ceremonies, *or other purposes,* authorized or sanctioned by [the Episcopal Church] *and for none other purposes. . . .*" (Pet. 77). Again, the description of this item of evidence by petitioners exemplifies not a religious entanglement within the facts reviewed by the Colorado Supreme Court, but an apparent misimpression by petitioners themselves as to the existence of an "entanglement," or else an attempt to construct one.

What is actually before this Court, as opposed to petitioners' assertions of a forbidden passage from "the secular to the non-secular," is a concrete and detailed factual record established in the trial court, based upon stipulations and undisputed evidence,

not challenged by petitioners in the courts below, and properly taken into account by the Colorado Supreme Court. The Colorado Supreme Court has applied Colorado trust law to that evidence, and in doing so has acted well within the parameters of the First Amendment and of this Court's analysis in *Jones v. Wolf*.

II. DIFFERING OUTCOMES IN THE STATE COURTS CITED BY PETITIONERS PRESENT NOT A "CONFLICT" TO BE ADDRESSED BY NEW AND MORE RIGID RULES FOR RESOLVING CHURCH PROPERTY DISPUTES, BUT A NATURAL AND CONSTITUTIONALLY CORRECT RESULT OF THE FLEXIBLE NEUTRAL PRINCIPLES APPROACH

Petitioners contend that review should be granted in this case because the lower courts are purportedly "in conflict and confusion concerning the neutral principles analysis of *Jones v. Wolf*." (Pet. 20). Respondents strongly believe that petitioners have failed to show the existence of the "conflict and confusion" which they assert.

It is certainly correct that as compared with the so-called "polity doctrine" or "rule of compulsory deference" set forth in *Watson v. Jones*,[4] the neutral principles approach does not prescribe a precise recipe or method for the lower courts to follow in resolving every church property controversy. Under *Jones v. Wolf* and the line of "neutral principles" cases which preceeded *Jones*, such disputes may be decided on the basis of "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions of the constitution of the general church concerning the ownership and control of church property," 443 U.S. at 604. The neutral principles analysis thus not only permits but surely contemplates, at least to some extent, differing results in different

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[4] 80 U.S. (13 Wall.) 679 (1871).

states, depending upon: (1) the specific form of neutral principles analysis implemented (whether "rebuttable presumption," state statute, or the common law of trust, or property or corporations); (2) the nature of the factual record in each controversy; and (3) the substantive content of the state law relevant to the particular dispute.

In *Jones v. Wolf*, this Court took note that the application of neutral principles would not be free of difficulty, 443 U.S. at 605, but concluded that:

> "On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.' *Presbyterian Church I*, 393 U.S. at 449, 89 S.Ct., at 606."

443 U.S. at 605.

Where church property disputes are to be decided on the basis of the same constitutionally neutral statutes or common law principles applicable to secular corporations or voluntary associations, it is not surprising that generally similar controversies confronting different state courts will sometimes yield different outcomes, depending upon differing state law or different elements in the factual background. It is this consequence, rather than any fundamental "conflict" of interpretation which is responsible for the results in the lower court decisions cited by petitioners. Petitioners say, for example, that in *Babcock Memorial Presbyterian Church v. The Presbytery of Baltimore*, 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984), the Court of Appeals of Maryland based its decision on the denomination's

Book of Order but thereby purportedly reached a result "in conflict" with that reached by other courts on the same evidence. (Pet. 22-23). In the first place, although the Maryland Court of Appeals concluded that the Book of Order was not consistent with the claims of control made by the local church, it expressly referenced as "more important" the fact that the local church corporation "lacked power under Maryland corporation law" to make the disposition of property at issue in that case. 446 A.2d at 1017.

Petitioners cite the case of *Foss v. Dykstra*, 342 N.W.2d 220 (S.D. 1983) as an instance of a "contrary" holding regarding the effect of the Presbyterian Book of Order. (Pet. 23). Actually, the Supreme Court of South Dakota rests its decision in that case not on any one item of evidence but on a combination of facts which together demonstrated that the parent church did not control the property in question (local church articles reference no denominational affiliation; amended articles of incorporation mention no affiliation; mortgage instruments recognize right of local church to withdraw; property mortgage does not mention parent church; local church's articles state purpose of incorporation is for usage of local church). 342 N.W.2d at 222-224.

Similarly, in *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 105 S.Ct. 2361 (1985), a case repeatedly cited by petitioners as manifesting a "conflict" over what may constitute a trust relationship, the Supreme Court of Missouri cites not merely the Book of Order but multiple facts showing control by the local church (historical control had "always" been exercised by the local church; national church not mentioned in documents related to encumbrances of local church property; national church loaned money to local church but received only defeasible security interest) 668 S.W.2d at 473. Both *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal. App. 3d 910, 152 Cal. Rptr. 854, *cert. denied*, 444 U.S. 974 (1979) and *First Presbyterian Church of Schenectady v. Presbyterian Church in the United States of Am.*, 62 N.Y.2d 110, 464 N.E.2d 454, 476 N.Y.S.2d 86, *cert. denied*, 105 S.Ct. 514 (1984), also involved not just consideration of the "Book of

Order" but a review of a particular complex of facts persuasive to those lower courts on the issue of local versus parent church control.[5]

In sum, respondents submit that while there are predictable variations in the state court decisions applying differing versions of the neutral principles analysis, such differences are an entirely proper result of an approach specifically designed to incorporate the flexibility mandated by the First Amendment.

CONCLUSION

The Colorado Supreme Court carefully and correctly implemented in this case the neutral principles analysis. The Court determined that under Colorado trust law and based upon undisputed facts, "an intent on the part of the local church corporation to dedicate its property irrevocably for the purposes of PECUSA was expressed *unambiguously* in the combination of the 1955 Articles of Incorporation, the local church by-laws, and the canons of the general church, to which the local church acceded in its Articles at the time this dispute arose in 1976." (Pet. App. 70a-71a; emphasis added). Petitioners have shown no fundamental respect in which the decision of the Colorado Supreme Court, or the method of decision of that Court, either requires reversal or merits review. It is respectfully submitted that the Petition should be denied.

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[5]In *Presbytery of Riverside*, the local church had demonstrated, and the trial court had taken into account, a long history of operation as a *non*-denominational, community church. 152 Cal. Rptr. at 157. In *First Presbyterian Church*, the New York Court of Appeals focused on the fact that the local church had chosed *not* to bring itself within a state statute providing for parent church control over disputed property. 476 N.Y.S.2d at 93, 94-95.

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July 28, 1986

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2093

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE REVEREND JAMES O. MOTE, *et al.*,
Petitioners,

v.

THE BISHOP AND DIOCESE OF COLORADO, *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents would have the Court believe that state court decisions since *Jones v. Wolf,* 443 U.S. 595 (1979), reflect no conflict or confusion over the neutral principles doctrine, that Petitioners' interpretation of neutral principles is inflexible and would narrow or redefine the doctrine, and that the Colorado Supreme Court properly applied the neutral principles doctrine in deciding the case below. Respondents overstate their position and, in doing so, serve to highlight the discord among state courts over the meaning and proper application of the neutral principles analysis in church property cases, and the need for further guidance from this Court.

1. In the years since *Jones v. Wolf,* commentators have chronicled the difficulties that state courts have

experienced in applying the neutral principles analysis, the conflicting opinions in church property cases that *Jones* has left in its wake, and the ill effects of such decisional discord. *See* Pet. at 21-22, 27 and accompanying notes. Even the lower courts themselves, including the court below (*see* Pet. App. 81a-83a), have observed the widespread conflict among opinions that have been issued under the neutral principles analysis since *Jones;*[1] these conflicts are reflected both by the contrary results reached in church property disputes arising within the same denominations in similar factual contexts (*see* Pet. at 22-23), and by the differing evidentiary treatment that courts have given to supposed indicators of an intent to create a trust (*see* Pet. at 24-26).

Respondents seek to explain these conflicts by attributing them to "differing state law or differing elements in the factual background" of the cases, not to any fundamental conflict in courts' interpretation of neutral principles. Respondents' Brief at 11. That, however, simply is not the case.

While church property cases will always involve some factual differences, and although the property and trust laws to be applied in these cases will naturally vary from state to state, such distinctions do *not* account for the contrary outcomes of the cases discussed by Petitioner at pages 22-23 of the Petition, and do *not* explain the differing significance accorded to the indicators of trust discussed at pages 24-26 of the Petition. Instead, what does account for these

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[1] *See, e.g., Presbytery of Elijah Parish Lovejoy v. Jaeggi,* 682 S.W.2d 465, 471-73 (Mo. 1984), *cert. denied,* 105 S.Ct. 2361 (1985).

divergent results and interpretations are the lower courts' conflicting views of what evidence may be considered under the neutral principles analysis of *Jones,* and what inferences may be drawn from such evidence. This is true, for example, in the cases discussed by Respondents at pages 11-13 of their brief and by Petitioners at pages 22-23 of the Petition, where the contrary opinions resulted not from the differing factual elements of the cases but, rather, primarily from the courts' fundamental disagreement over whether, and to what extent, provisions in the Book of Order could be considered and could be deemed to give rise to a trust over local church property, i.e., whether, and to what extent, such evidence was cognizable for purposes of neutral principles analysis.[2]

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[2] *Compare Foss v. Dykstra,* 342 N.W.2d 220, 225 n.7 (S.D. 1983) ("our conclusion that the Book of Order as it existed on November 24, 1980, did not contain provisions creating a trust over local property") *and First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States of Am.*, 62 N.Y.2d 110, 464 N.E.2d 454, 476 N.Y.S.2d 86, *cert. denied,* 105 S.Ct. 514 (1984) (Book of Order contains no provisions expressly or impliedly creating trust over local church property in favor of parent church), *with Fonken v. Community Church of Kamrar,* 339 N.W.2d 810, 818 (Iowa 1983) ("When its provisions are construed together, the Book of Order gives UPCUSA exclusive ultimate control of the uses and disposition of local church property.") *and Babcock Memorial Presbyterian Church v. The Presbytery of Baltimore,* 296 Md. 573, 590, 464 A.2d 1008, 1017 (1983), *cert. denied,* 465 U.S. 1027 (1984) ("the local church under United's Book of Order could not sell property without permission [from the denomination]"). *See also, e.g., Presbytery of Elijah Parish Lovejoy v. Jaeggi,* 682 S.W.2d 465, 471-73 (Mo. 1984), *cert. denied,* 105 S.Ct. 2361 (1985), where the Supreme Court of Missouri, sitting *en banc,* analyzed a num-

2. Respondents' failure to perceive the real cause for conflict among these cases results from their refusal to accept the neutral principles analysis for what it is and what it was intended by this Court to be—a restrictive rule of evidence that establishes limits on what a court may consider in determining the existence of a trust over local church property in favor of a denomination. Thus, while we concur with Respondents that a virtue of the neutral principles doctrine is the flexibility that it affords to state courts to adopt any one of various approaches for settling church property disputes, the doctrine imposes immutable limits on the evidence that may be considered under any of the alternative approaches, limits that adhere regardless of differences in the factual context of, or state trust laws applicable to, the particular case. This characteristic was clearly intended by the majority in *Jones,* which stated that a court could adopt any neutral principles method for deciding church property disputes, but only " 'so long as it involves no consideration of doctrinal matters . . .' ", *Jones v. Wolf,* 443 U.S. at 602 (*quoting Maryland and Va. Churches v. Sharpsburg Church,* 396 U.S. 367, 368 (1970)), so long as it "take[s] special care to scrutinize the document[s] in purely secular terms . . .", 443 U.S. at 604, and so long as it "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at

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ber of conflicting church property opinions arising within the United Presbyterian Church in the United States of America ("UPCUSA"). The court's analysis reflects that the decisive issue in those cases was whether the Book of Order established an implied trust in favor of UPCUSA. As the court observed, courts in Iowa and Maryland held that it did, while courts in New York and South Dakota held that it did not.

603. Although not in agreement, the dissent in *Jones* also recognized this signal feature of neutral principles analysis, referring to it as a "restrictive rule of evidence" (*id.* at 611) that would allow civil courts to consider only evidence that "has been stated, in express relation to church property, in the language of trust and property law" (*id.* at 612)(footnote omitted).

3. Like Respondents, the court below also misperceived the evidentiary limits that the neutral principles analysis imposes. Although the court correctly observed that the neutral principles analysis allows courts to examine not only deeds, statutes, corporate charters and similar instruments but also church constitutions, by-laws and the like, it rejected this Court's instruction that such instruments could be examined only for the purpose of identifying secular provisions that expressly, or by clear implication, inform the court in purely secular terms how the parties intended to dispose of local church property in the event of a dispute. Instead, embracing the rationale of the dissent in *Jones,* it argued at length why, contrary to the majority's edict in *Jones,* it could consider evidence that was not expressed in the traditional forms and language of trust law (*see* Pet. App. 62a-67a), even though such evidence consisted of non-secular matters such as St. Mary's vows of accession to the constitution and canons of PECUSA, its promises of conformity to the doctrine, discipline and worship of the church, and its participation in diocesan affairs.[3]

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[3] Respondents seek to legitimize the Colorado Supreme Court's reliance upon such non-secular facts by stating that such facts were part of the "record established in the trial court, based

In examining and relying upon such evidence, the court below ventured into the interpretation of religious doctrine, practice and polity, matters which this Court said in *Jones* that state courts must not even *consider* as part of a neutral principles analysis. 443 U.S. at 602. In seeking to interpret such ecclesiastic matters in its search for indicators of a trust intent, the court below unwittingly became a vehicle for the enforcement of religious discipline by a denomination upon its seceding members. For, particularly in the

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upon stipulations and undisputed evidence, not challenged by petitioners in the courts below. . . ." Respondents' Brief at 9-10. Respondents are mistaken in two significant respects. First, although the facts found by the trial court were, as we noted at page 2 of the Petition, "based *in part* on a stipulation and were *generally* not in dispute" (emphasis added), some of the most important facts were directly controverted. For example, while the Colorado Supreme Court ultimately found an intent on the part of the local parish to hold property in trust for the denomination, based on the accession clause and on other parts of the supposedly uncontroverted factual record, that ignored the testimony of all but one of the persons who signed the accession clause that, in acceding to the canons and constitution, it was *not* their intent to establish a trust over St. Mary's property in favor of the Diocese. *See* R. (Folio) 1260-62, 1286-87, 1307. Second, and more importantly, Respondents asserted in the trial court that the case should be decided on, *inter alia*, a "polity" theory under *Watson v. Jones*, 80 U.S. (13 Wall) 679 (1871), and the trial court so held. *See* Pet. App. 14a. Consequently, much evidence introduced by Respondents, on which the trial court based a substantial portion of its findings, was germane to a polity inquiry but was uncognizable for purposes of a neutral principles analysis. Thus, while the substance of some of the facts to which Respondents refer was undisputed in the trial court, the relevance of such facts to, and the permissibility of considering those facts as part of, a neutral principles analysis was and is most assuredly contested and is at the heart of this petition for writ of certiorari.

case of a church that is doctrinally hierarchical in polity, such as here, examination of the types of matters on which the court below relied will virtually always yield a conclusion that the parent church has exercised substantial control over the local parish *during its period of affiliation*, even perhaps relating to the use of local church property, even though such activities may reveal nothing about the parties' intentions regarding such property *in the event of a withdrawal of the congregation from the denomination. See* Pet. at 14 n.8, 29 n.29. Because of the importance of a local church's property to its continued identity, unity and viability, the effect of such an interpretation of the neutral principles doctrine would be to make it a badge of perpetual submission that forever binds a congregation to its denomination, no matter how deep and lasting a schism may have become.

4. In *Jones,* the Court observed that problems in application of the neutral principles analysis "should be gradually eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.' [Citations omitted]." 443 U.S. at 604. In the ensuing years since *Jones* was decided, the confusion and resulting decisional discord in application of the neutral principles analysis has not abated, and conflicting opinions continue to be issued.[4] Commentators suggest, moreover, that ab-

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[4] *See, e.g., Mikilak v. Orthodox Church In America,* No. 78 T.D. 1985 (Comm.Ct.Pa., July 29, 1986), where the Commonwealth Court of Pennsylvania reversed the decision of the lower

sent further guidance from the Court, this confusion and conflict is likely to persist. *See* Pet. at 21-22, 27 and accompanying notes. Because church property disputes implicate not merely the property itself but, rather, the exercise of a congregation's religious freedom to associate or disassociate with a denomination free of the coercive effect that forfeiture of its property might impose, Petitioners submit that it is imperative that the Court take this opportunity to clarify the scope of permissible inquiry under the neutral principles doctrine.

For these reasons, and those stated in the Petition, a writ of certiorari should be issued to the court below.

Respectfully submitted,

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court because, contrary to *Jones v. Wolf*, the church documents "evidence[d] only an ambiguous intent to create a trust" and did not contain "the clear unequivocal evidence necessary to support a conclusion that a trust existed." Slip Op. at 10.

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August 13, 1986